11-1700-11362-2

STATE OF MINNESOTA

OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

State of Minnesota by Dolores Fridge, Commissioner, Department of Human Rights,

Complainant,

v.

Schult Homes Corporation,

Respondent.

**FINDINGS OF FACT, CONCLUSIONS, AND INITIAL ORDER**

The above-entitled matter came on for hearing before Administrative Law Judge Barbara L. Neilson on April 8-9, 1998, in Redwood Falls, Minnesota. The hearing was held pursuant to a Notice of and Order for Hearing issued by the Commissioner of the Department of Human Rights on October 2, 1997. Richard L. Varco, Jr., Assistant Attorney General, Suite 1200, 445 Minnesota Street, St. Paul, Minnesota 55101-2130, appeared on behalf of the Complainant, the State of Minnesota by Dolores Fridge, Commissioner, Department of Human Rights. Frederick E. Finch, Attorney at Law, Bassford, Lockhart, Truesdell & Briggs, P.A., 3550 Multifoods Tower, 33 South Sixth Street, Minneapolis, Minnesota 55402-3787, appeared on behalf of the Respondent, Schult Homes Corporation. The record closed on August 18, 1998.

## NOTICE

This Order is not the final decision in this case. The final decision will be issued after consideration of any petition submitted by the Complainant for an award of attorneys' fees and litigation and hearing costs and any response thereto submitted by the Respondent. Once a final decision is issued, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63-14.69, in accordance with Minn. Stat. § 363.072.

## STATEMENT OF ISSUES

The issues to be determined in this contested case proceeding are whether the Respondent violated the Minnesota Human Rights Act by terminating the Charging Party's employment due to perceived disability and, if so, what damages or other relief, if any, should be assessed pursuant to Minn. Stat. § 363.071, subd. 2.

Based upon all of the files, records, and proceedings herein, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

I. Background Information

1. The Respondent, Schult Homes Corporation ("Schult"), constructs and sells manufactured housing. The corporation is headquartered in Indiana. At all times relevant to this proceeding, Schult employed more than fifteen employees. During the time period relevant to this proceeding, the Company operated approximately eight plants in several locations across the country and employed approximately 1,500-1,800 employees. The Company currently operates eleven plants and employs a total of 2,500 employees. The Redwood Falls, Minnesota, plant is involved in this matter. Last year, the Redwood Falls plant produced about $32 million of product. During 1993, the plant produced approximately $25 million. T. 371-72; Complaint, ¶ 4; Answer, ¶ 3.

2. The Charging Party, Susan Rathman Anderson, has lived and worked in small towns in southwestern and west central Minnesota during most of her adult life, including Montevideo, Hanley Falls, Granite Falls, Redwood Falls, Lamberton, Wabasso, and Lucan. T. 22, 82, 97, 105. During 1993, Ms. Anderson was the single parent of three children who were then three, seven, and eleven years of age. T. 43. Although Ms. Anderson receives child support payments at times, the payments are not always made in a reliable and timely fashion. T. 44-45, 202.

3. Ms. Anderson left high school in Granite Falls, Minnesota, at the end of her sophomore year. She has since obtained a high school equivalency degree through the GED program. Her education since high school has included attending a one-year program at Granite Falls Vocational Technical School in mechanical drafting and design and a three-month course at Willmar Vocational-Technical Institute in technical art and illustration. T. 28, 88-91.

4. Prior to her employment with Schult in May, 1993, Ms. Anderson had worked during 1987 or 1988 for eight to nine months as a final finishing inspector for Friendship Homes, a manufactured housing plant in Montevideo, Minnesota. She was responsible for cleaning, vacuuming, hanging curtains, touching up painting, and otherwise ensuring that manufactured housing was ready for shipping to the customer. T. 98-99. In addition, she had previously held jobs in farming, construction, home repair, and cleaning that involved physical labor. T. 100-06, 141. She had also held several jobs as a waitress and bartender, and a job operating a machine at a beet plant. T. 92-95, 99, 107, 111, 118-19, 123. Many of these jobs, such as the farm, beet plant, home repair, cleaning, waitressing and construction jobs, involved lifting more than 25 pounds. T. 101-02, 104-07, 110.

5. Ms. Anderson began working for Schult as a general laborer on May 14, 1993. T. 23, 141, 269, 323. Before she was hired, she was interviewed by Terry Parris. T. 138. Mr. Parris is a line supervisor who has worked at Schult Homes for 19 years. T.

258. Ms. Anderson's job application caught Mr. Parris' attention because she had some mechanical drafting background that he thought would be beneficial in reading a blueprint and determining where walls were to be placed. T. 320. Mr. Parris told Ms. Anderson that she would be a good person to hire because she had had prior experience in the manufactured housing industry and also was able to read blueprints. The ability to read blueprints is a useful skill for individuals in Schult's Wall Department (also known as partitions and side walls or small walls and exterior walls), which is supervised by Mr. Parris. T. 27-28, 258, 319-20. At the time of Ms. Anderson's employment at Schult, Mr. Parris supervised three departments in which general laborers worked: the mill room, interior partitions, and side walls. T. 258, 269. General laborers also worked in a separate department called the Hardware Department at that time. T. 269.

6. As part of the interview process, Mr. Parris showed Ms. Anderson around the plant, showed her the Wall Department and described the job duties that she would be performing. T. 138, 140, 321. Employees working in the Wall Department do a little bit of everything in that department. The job includes laying out the floors with the tape measure and blue chalk and reading the blueprints, pulling in the exterior walls, working on the wall table, and installing the partition walls on the units. T. 139-40. Because of her experience at Friendship Homes, Ms. Anderson knew that the work would be tough and physically demanding. T. 140. After the interview process was completed, Mr. Parris determined that Ms. Anderson had the necessary qualifications and recommended to the personnel director that she be hired. T. 322.

7. The first ninety days of employment at Schult are considered a training period which is, in essence, a probationary period. One purpose of the probationary period is to see whether an employee can perform the job. T. 203-04; Ex. 6-F at 5.

8. When Ms. Anderson began working at Schult on May 14, 1993, she was provided with an employee orientation that included a presentation on safety practices and instructions regarding how to report accidents, lift things correctly, and operate the pneumatic staple and nailing guns in a safe manner. T. 141, 323-24.

9. Ms. Anderson was interested in working for Schult because the job paid more than her waitressing and bartending jobs and she was able to work during the daytime and spend nights, holidays, and weekends with her children. The job at Schult enabled Ms. Anderson to rent a home that was located close to the school her children attended so that her children could easily walk to and from extra-curricular activities at the school. T. 46, 131-34. Her superiors at Schult were not aware that she had moved into a different house requiring a higher monthly rent. T. 204-05.

10. When Ms. Anderson began working for Schult, she was assigned to the Walls Department. T. 319. Workers in this department construct walls for manufactured housing units. This work is done at one of two tables, depending on the size of the walls being constructed. The larger exterior walls are constructed on one table, and the smaller interior walls are constructed on another. Construction consists of laying out wooden framing and braces which make up the walls, nailing this framing together, transporting the walls by hand or by mechanical lift from the tables to the nearby floor of the manufactured

home, and fastening the walls together and to the unit. The latter task, which is described as "pulling in the walls," involves the use of a ladder, a large clamp used to draw one wall to another, and a gun that inserts the screws into the frame that holds the walls together. T. 23-26; site visit.

11. The laying out and construction of walls in the Wall Department at Schult involves the lifting of heavy material and equipment. T. 26. The work is physically demanding. T. 27, 30-31, 140. Ms. Anderson's work on the wall table involved laying 2 x 2, 2 x 3, or 2 x 4 studs out on the table in a particular pattern, attaching floor plates and sills to the top and bottom using a staple gun, and attaching Gypsum boards that were 3/8" thick on top of the studs. T. 167-69. The studs weighed four to eight pounds. The staple guns were within a 25-pound weight restriction. Ms. Anderson's doctors never told her not to work with that type of staple gun. T. 169-71. Ms. Anderson never complained to her supervisors that the staple gun was too heavy for her. T. 171. After the wall was finished, it was moved either by sliding it over to the edge of the table and two or more people would move it into an upright vertical position and then move it to the platform or into storage, or an overhead hoist could be used. T. 172-73, 174. However, using the hoist took much more time than it did for workers to move the wall manually. At the time Ms. Anderson worked at Schult, there was a backlog of orders. Employees were told to hurry up and worked at a faster pace. T. 174-75, 276. In addition, they received bonus pay based upon their productivity. T. 131, 273-74.

12. Ms. Anderson's main job duties when she started working at Schult involved wall-building and pulling in exterior walls. She did not spend much time reading blueprints and laying out the floors. T. 143.

13. During the first week of June, 1993, Ms. Anderson began to experience sore arms as a result of her work at Schult and began noticing that she had some swelling, numbness, and tingling in her hands and arms when she went home at night. These symptoms started interfering with her sleep. T. 27, 143-44. She told Mr. Parris about these symptoms during the first week of June. T. 30, 144, 234, 324. Ms. Anderson asked if there were still openings in the final finish department or some other area, because Mr. Parris had told her when she was hired that, if things became a little bit too tough in her department, he would find her another area in which to work. T. 31. Mr. Parris acknowledged that he and others had also experienced similar symptoms at the beginning of their employment in this department, that it took a little while to become physically used to the job, and that the symptoms generally went away as the muscles became conditioned. T. 27, 30-31, 144, 329-30.

14. Mr. Parris, with the assistance of Mike Bernardy, the group leader in the Small Walls Department, evaluated Ms. Anderson on a form entitled "New Employee Evaluation" on May 17, May 18, May 19, and May 20, 1993. On all of these forms, Ms. Anderson was rated between "average" and "above average" on all of the evaluation checklist items, including her overall rating. It was noted that she had shown improvement in all areas and had satisfactorily performed all areas. Mr. Bernardy and Mr. Parris also evaluated Ms. Anderson on a form entitled "10 Day New Employee Report," which they signed on May 26 and May 27, 1993, respectively. On this report, Ms. Anderson's progress was

evaluated as “better than average” and it was noted that Ms. Anderson seemed to be doing particularly well during the past weeks in pulling in sidewalls, building walls, and marking out sidewalls and floors. A New Employee 30/60/90 Day Interview/Evaluation form dated June 14, 1993, further evaluated Ms. Anderson as average with respect to her quality and quantity of work, dependability, relations with others, and knowledge/versatility; above average with respect to her attitude/cooperation and housekeeping/safety; and excellent with respect to her attendance. Her overall performance was noted to be satisfactory. T. 31-33, 327, 329-30; Ex. 3 (Response to Request No. 31 and Attachment 7).

15. On June 14, 1993, Ms. Anderson was experiencing pain in her arms. Mr. Parris was conducting her thirty-day review on that date. During the review, Mr. Parris asked about her arms. Ms. Anderson told Mr. Parris that she was still having lots of problems with her hands and arms and that they were getting worse. Mr. Parris asked Ms. Anderson if she would see the company doctor, and Ms. Anderson said she was willing to do so. Mr. Parris said that maybe he would try to take her off the pulling in of the exterior walls and have her work basically in the wall-building department building walls on the tables. For a time after her thirty-day review, Ms. Anderson did not work on pulling in the exterior walls. T. 32-34, 64, 144-47, 235-36; Ex. 3 (Response to Request No. 31 and Attachment 7).

16. On June 14, 1993, Ms. Anderson was told to go home early because she was having difficulty and was in pain. Ms. Anderson went home at about 2:00 p.m. T. 34-36, 47, 147-49; Ex. 7B. Ms. Anderson made an appointment to visit a doctor the following day. T. 37.

17. On June 15, 1993, Ms. Anderson did not work at Schult because she was still in a lot of pain. She went to see Dr. G.W. Kaminski that day. Dr. Kaminski told Ms. Anderson that she had arthralgia, a common form of arthritis, and gave her a prescription for some medicine. He also told her that she should do some form of lighter work for a while, but did not tell her what kind of work she was able to do, give her a weight restriction with respect to lifting, or restrict her from working with vibrating tools, from working on step ladders with pipe clamps, or from working on the wall table. Dr. Kaminski told Ms. Anderson that her condition was likely caused by overwork. T. 37-38, 150-51, 157; Exs. 4 (attachment R00002) and 8E.

18. Ms. Anderson returned to work at Schult on June 16, 1993. Mr. Parris met her at the time clock. Ms. Anderson gave Mr. Parris a note from Dr. Kaminski, informed him that the doctor had said that she had a common form of arthritis, and told him that her muscles and joints were overworked and overstressed and she needed lighter duty work. T. 38-39, 152-53, 157, 238-39, 331.

19. Later during the morning of June 16, 1993, Mr. Parris asked Ms. Anderson to come with him to a conference room at Schult. T. 40, 153. During their discussion in the conference room, Ms. Anderson informed Mr. Parris that she had been diagnosed with a common form of arthritis which likely was caused by overwork, there was nothing seriously wrong with her, and that she needed to do lighter work. T. 40, 157. Mr. Parris indicated to

Ms. Anderson that, because she had arthritis, the company did not want to be responsible for crippling her, and told her that her employment would be terminated. T. 40, 153. Ms. Anderson informed Mr. Parris that the diagnosis from Dr. Kaminski was merely a mild form of arthritis and told him that she did not have crippling arthritis. She asked Mr. Parris to give her a job in the final finish area and reminded him that he had informed her that he would find her a job in another department if the job in the Walls Department did not work out. T. 40-41, 75-76, 209. Ms. Anderson became very upset during this conversation. She cried and, according to Mr. Parris, "became more emotional to the point where she was sobbing." T. 335. Ms. Anderson had never been terminated from a job before. In addition, she was upset because she did not know how she would take care of her children. T. 41-42, 46-47.

20. Schult's personnel policies and procedures require that a supervisor confer with the production manager before an employee is terminated. In addition, two persons are supposed to be present in order to terminate an employee. After the termination, employees are generally required to return any company tools and to stop at the office of the personnel director or manager so that a termination notice may be completed. T. 337. These procedures were not followed on June 16, 1993, when Mr. Parris terminated Ms. Anderson's employment. Mr. Parris met with Ms. Anderson alone and did not give Ms. Anderson a separation notice or take her down to the personnel office. T. 155. In addition, Ms. Anderson was not given any paperwork indicating that she had been terminated. T. 156, 158.

21. During the morning of June 17, 1993, Ms. Anderson returned to Schult with her children to pick up her paycheck. The receptionist paged Mr. Parris to come to the front desk, since he had the paycheck. T. 159. Mr. Parris asked Ms. Anderson if she wanted her job back at that time. T. 159. He informed her that he had lined up a job for her in a different department which would involve lighter work. T. 159-60. He said that Joel Bill, another Schult employee who had been working in the Hardware Department, was quitting, so she could work in that area. Mr. Bill eventually left Schult sometime in August, 1993. T. 160, 163, 263-65, 340. Ms. Anderson told Mr. Parris that, while she was willing to return to work, she could not return that day because of a previously-scheduled doctor's appointment. She told him that she would come in at 7:00 the next morning. T. 47-50, 158-61. Mr. Parris sought out an opening for Ms. Anderson in the Hardware Department because it was apparent to him that her duties in the Walls Department were too strenuous for her and caused her pain. T. 263-64. The job in the Hardware Department required very little lifting, and the weight involved was typically less than ten pounds. T. 264.

22. Later in the day on June 17, 1993, Ms. Anderson went to see Dr. Pogemiller. T. 47-48, 50; Ex. 8D. Ms. Anderson told Dr. Pogemiller that she had consulted with a doctor in Redwood Falls who said that she had arthritis and "got her fired from her job." Ex. 8D. She told him that she had been rehired that morning and was going to get a lighter duty job at the same plant. She also told him that she wanted a second opinion from him that she did not have arthritis. T. 47-48, 51; Ex. 8D. Dr. Pogemiller concluded that Ms. Anderson was suffering from a common form of arthritis or arthralgia caused by overwork, and indicated that lighter duty would have been better. T. 50-51, 161. Dr.

Pogemiller's medical records relating to the examination of Ms. Anderson indicate that he determined that Ms. Anderson had "multiple arthralgias" and that it would be "a reasonable thing for her to try working at the lighter job." Ex. 8D.

23. Dr. Pogemiller gave Ms. Anderson a note that she brought back to work at Schult the next day. The note indicated that Ms. Anderson had "arthralgias in her joints" but "should be able to do lighter work" and thus could return to work. T. 51; Exs. 6A, 8G. Dr. Pogemiller did not tell Ms. Anderson what kind of lighter work she should be doing and did not give her a weight restriction, prohibit her from operating any kinds of machinery, or tell her to avoid any particular motions. T. 161.

24. Ms. Anderson returned to work at Schult at 7:00 a.m. on June 18, 1993. T. 52, 161-62, Ex. 7B. Mr. Parris told her that he would come to the wall table 15-20 minutes after her arrival back at work and bring her to the Hardware Department. Despite Mr. Parris' statement, Ms. Anderson in fact worked exclusively at the wall table for 2-1/2 days. T. 52-53, 176.

25. While working in the Wall Department, Ms. Anderson was free to ask for help in lifting and received assistance from other employees every time she asked for help. T. 166, 173, 174, 176. Following Ms. Anderson's return to work, for a short time she was not required to work on a stepladder and use a bar clamp and screw gun to pull in the exterior walls as often as she had previously. T. 163, 166. She had told Mr. Parris that she felt that the screw gun was causing a particular problem for her, and Mr. Parris said that she should perhaps work on the wall table a little bit more. T. 164. After a day or two, Ms. Anderson continued to be required to pull in the exterior walls, however. T. 166.

26. On approximately June 22, 1993, during the afternoon of the third day after her return, Mr. Parris brought Ms. Anderson to the Hardware Department, introduced her to a co-worker, and had her work there the remainder of the afternoon to fill in for Mr. Bill, who had become ill and had gone home. T. 53-54, 162-63, 177-78. Mr. Parris intended that Ms. Anderson would work in the Hardware Department job for a trial period to see if she could adapt to the position before the job became available. T. 267.

27. Individuals working in the Hardware Department assembled cabinets and cabinet drawers and attached fittings to them. This work involved the use of a mitre llsaw and a power screwdriver and did not require employees to lift tools, equipment, or material in excess of 25 pounds. In fact, most of the lifting involved less than ten pounds. T. 264; Ex. 4 at R00016.

28. After her first afternoon in the Hardware Department, Ms. Anderson continued to work at the wall table full-time for approximately one more week. T. 53-54, 163, 177-78. Thereafter, Ms. Anderson worked some half-days (afternoons), no more than four hours per day, in the Hardware Department if one of the regular workers in the shop was not at work, but more frequently spent full days working at the wall table. T. 54, 59-61, 188. There was never any specific time set for her to be in the Hardware Department, and she never worked in that Department a full day during the remainder of the time she worked at Schult Homes. T. 59, 60, 188.

29. At approximately 2:00 p.m. on June 29, 1993, while working in the Hardware Department, Ms. Anderson was injured by a board that kicked back out of the mitre saw that she was operating due to a missing or damaged guard. T. 54-57, 182, 377. She did not report the injury to a supervisor that day, but simply washed her hand off and applied a Band-Aid. T. 57, 183-84. She continued to work the remainder of the day. T. 57, 184. The next morning, while Ms. Anderson was working at the wall table, she had difficulty carrying the walls and building them due to her bruised and swollen hand and inability to bend her fingers. T. 57, 61-62. She reported the injury to Mike Schultz, the supervisor in the Hardware Department, that afternoon and told him that she was going to make an appointment with her doctor. T. 62, 184-85, 239, 377-78. The Employee Handbook in effect at the time stated that accident reports "must be filed with [the employee's] supervisor or safety committee within twenty-four (24) hours of the occurrence or detection of the work-related injury or illness." Ex. 6F.

30. Following Ms. Anderson's injury on June 29, Mr. Parris again asked her if she was willing to see the company doctor. Ms. Anderson once again consented to do so. T. 64. She signed a written consent form on July 2, 1993, in which she agreed to have the company doctor examine her for her medical condition of arthritis. Ex. 6D.

31. Ms. Anderson continued to work at Schult on June 30 and July 1-2. T. 187-88, 379. Ms. Anderson was not scheduled to work on July 3-4, and the following Monday, July 5, was a holiday. T. 188-89. The pain she was experiencing in her hands and forearms did not diminish over the holiday weekend. T. 190. On July 6, 1993, Ms. Anderson left work early because her injured hand was still painful, black and blue, and swollen, and her arms hurt. She also stayed home on July 7 and July 8, 1993, due to the pain. T. 65, 189-90, 380-81; Exs. 4 (attachment R00003), 7B.

32. On July 8, 1993, Ms. Anderson saw Dr. Angstman, Schult's company doctor, about the mitre saw injury and about her sore arms. T. 63, 65, 185-86, 190. Schult asked Ms. Anderson to see Dr. Angstman because the Company wanted to have her checked for arthritis and find out before her training period was over if she could handle the minimum requirements of the position. T. 279, 293. Dr. Angstman diagnosed a bruised hand and released Ms. Anderson back to work. T. 185-86 . Ms. Anderson told Dr. Angstman about the pain she was experiencing in her forearms. T. 186. Dr. Angstman tested Ms. Anderson for rheumatoid arthritis but eventually notified her by mail two weeks later than she did not have this condition. He told her that she had a common form of arthritis, which he described as "recurrent arthralgia's," caused by overwork and told her that she should do some lighter work for about two weeks. Exs. 8C, 10; T. 66-67, 190-91, 249. Dr. Angstman noted in Ms. Anderson's file that he recommended that Ms. Anderson lift no more than 50 pounds for two weeks and start taking a medication called Feldane. Ex. 8C. He told Ms. Anderson that she simply needed a break for a couple weeks for her muscles and joints to get back into shape. T. 66. He further told her that her muscles had been overworked and overstressed, said there was nothing serious that he could find, and indicated that a lighter duty job would do her a lot of good. T. 68. Dr. Angstman did not tell Ms. Anderson what kind of lighter work he wanted her to do, did not tell her about any modifications to her job that should be made, and did not tell her what particular types of motions or equipment she should avoid. T. 186-87, 191-92. In addition, in contrast with

the 50-pound restriction set forth in Dr. Angstman's medical notes, the Certificate to Return to School or Work form issued by Dr. Angstman dated July 8, 1993, stated that Ms. Anderson should lift less than 25 pounds during the two-week light duty period. Ex. 3 (Attachment 4) (under the remarks section, states "Light duty < 25# x 2 wk Rev in 2 wk").

33. On July 9, 1993, Ms. Anderson did not feel well, possibly as a result of the medication that Dr. Angstman had given her. She did not work at Schult that day. T. 68-69, 193; Exs. 4 (attachment R00003), 7B.

34. By postcard dated July 9, 1993, Ms. Anderson was informed by Dr. Angstman that he would tell Schult that she should go on light duty for two weeks, pending a recheck of her condition. T. 87; Ex. 9.

35. Jim Hacker, Mr. Parris' assistant, informed Mr. Weiers, the Company's Production Manager, about Ms. Anderson's absences from work due to pain and her scheduled appointment with the company doctor. T. 355-57.

36. On July 9, 1993, Mr. Weiers spoke with Dr. Angstman about the results of his examination of Ms. Anderson on July 8. T. 280, 357-58. Mr. Weiers told Dr. Angstman that Ms. Anderson was on a 90-day training program and the Company had to decide whether it should put Ms. Anderson on full-time and if she would be able to handle the work. Mr. Weiers asked Dr. Angstman if he felt that Ms. Anderson would be a good employee and be able to handle the limitations they had. Dr. Angstman did not provide a direct answer to this question. He did not give Mr. Weiers advice one way or the other on whether the Company should retain Ms. Anderson or fire her, but was very general in his remarks. T. 286-87, 359, 373. He said that, based on Ms. Anderson's condition, all of the problems she had had already, and Mr. Weier's knowledge of what skills and physical needs were required to do a general laborer job, Mr. Weiers had to make that decision and use his common sense to decide whether Ms. Anderson would be a good employee for Schult and be able to do the job they wanted. He said that Ms. Anderson's problem was not going to go away right away. T. 282, 286, 358, 373. Dr. Angstman also said that, with the problems Ms. Anderson was having, it did not look like a good deal for Ms. Anderson or for the Company to continue on. T. 284. Dr. Angstman did not give Mr. Weiers any label to apply to Ms. Anderson's condition. T. 373.

37. Mr. Weiers decided that he would terminate Ms. Anderson on Monday, July 12, 1993, because of her inability to handle the jobs they had for her and because of her attendance. T. 359-60. He did not speak with Mike Schultz about Ms. Anderson's performance in the Hardware Department before making the decision to terminate her, and did not know at the time she was terminated how well she was performing her duties in the Hardware Department. T. 370-71.

38. On July 12, 1993, after Ms. Anderson reported to work at Schult, she was called into a meeting with Mr. Weiers and Tom Bonjour, who was Schult's Safety Director/Head Facilitator. T. 69-70, 154; Ex. 4 (Response to Interrogatory No. 4). Mr. Parris was on vacation from approximately July 2, 1993, to July 16, 1993, and was not available. T. 341-42. During this meeting, Ms. Anderson was informed that her

probationary employment at Schult was being terminated. Mr. Weiers told her that she had been diagnosed as having crippling arthritis, the Company doctor had told him that she was unable to lift more than 25 pounds and they didn't have a place for her in the Company anymore. He said that Schult had too many people on workers' compensation and did not need another one. Mr. Weiers implied that Ms. Anderson would never be able to lift more than 25 pounds again in her life. He told Mr. Anderson that they did not want to "cripple" her and that they were going to let her go for her own good. T. 70-72. He did not describe any attempts Schult had made to try to place Ms. Anderson in another job. T. 77. Ms. Anderson told Mr. Weiers that she did not have crippling arthritis and had just been tested for "rheumatory" arthritis and the results would not be known for two more weeks. T. 71. She informed him that the doctor had told her light duty but had not told her any weight restrictions. T. 71. She further indicated that she had been told by Schult since the date of her hire that they could find her another job in another area that would be easier to do. She asked them if they weren't going to give her a lighter duty job at that time and emphasized that the doctors had been telling her that she just needed a break, and she had never been given the break that her muscles needed. T. 72. Ms. Anderson offered to take six weeks off the job and come back and do the job of another female who was going back to school. T. 72, 206. The Schult representatives responded that they could not ask her to do that but would have to let her go. T. 72-73. Mr. Weiers told her that she was an excellent worker and that the Company would give her an excellent recommendation. T. 73. Ms. Anderson requested that they give her such a recommendation before she left the plant that day. T. 73. She also requested that they provide her with a written explanation of why they were firing her. T. 73.

39. Although Ms. Anderson secretly tape-recorded this meeting, she lost the tape and the tape recorder and, consequently, did not produce the tape at the hearing or at any other time during this proceeding. T. 195-97, 240-42, 245-46.

40. After the meeting, Ms. Anderson and Mr. Weiers went to the Company's office, where some paperwork was completed and a separation notice was prepared stating why Ms. Anderson was being terminated. Ms. Anderson also received copies of her reviews. Mr. Weiers also prepared a letter of recommendation relating to Ms. Anderson on July 12 or a few days later, and provided a copy to Ms. Anderson. T. 74, 154-55, 198-201; 364, 366.

41. The Separation Notice was signed by Marlene Sand, who was in charge of personnel at Schult. The reason for termination as set forth on the Separation Notice form was the assertion that Ms. Anderson was "[u]nable to perform duties due to arthritis." T. 295, 361, 369; Ex. 8F. Ms. Sand said at the time that she was completing the form that "we might as well call it what it is." She further indicated that "everything [that the Company had] says it's arthritis, call it arthritis." T. 369, 370. Similarly, the Payroll Change Notice form completed by Jim Hacker and signed by Mr. Hacker, as Foreman, and John Weiers, as Superintendent, included the following comment in the "remarks" section: "Due to arthritis could not due [sic] work – limit to minus 25#." T. 356, 361; Ex. 8F. A notation was placed on Ms. Anderson's Employee's Daily Attendance Record that Ms. Anderson was terminated on July 12, 1993, because she was "[n]ot able to handle job hired for." Ex. 7B.

42. It was Mr. Weiers' belief, based on what Mr. Parris had told him, that Ms. Anderson tried very hard to do whatever Schult needed her to do. T. 367. The letter of recommendation stated, inter alia, that, "while Susan was in our employ, she was an excellent employee, willing to work hard, try new things and got along well with her fellow workers. Susan left our employ because of an arthritis condition whidh [sic] prevented her from lifting and building sidewalls. I would highly recommend Susan for any position which her arthritic condition would not interfere. I understand that she is now under medical care and the condition is improving." Ex. 3 (attachment 6).

43. By postcard dated July 14, 1993, Dr. Angstman notified Ms. Anderson that the tests she had undergone were normal and revealed no sign of specific rheumatological condition (arthritis disease). T. 67, 87; Ex. 10.

44. Ms. Anderson never told anyone employed at Schult that she had crippling arthritis. T. 376. None of her doctors diagnosed her with crippling arthritis; in fact, her test for rheumatoid arthritis was negative. Exs. 4 at R00006, 10.

45. Ms. Anderson was discharged from her employment at Schult based upon the mistaken belief of Mr. Weiers and Mr. Parris that she had a form of crippling arthritis. T. 40, 71, 365; Exs. 7A, 8F, 10.

46. During the July 12, 1993, termination meeting and several times prior thereto, Ms. Anderson offered to stay at Schult and take a job in final finish. T. 72, 75. When she first applied at Schult, she had asked for that position among others. T. 75. There in fact were no vacancies in the Final Finish Department during the time that Ms. Anderson was employed at Schult. T. 352, 368. In order to transfer Ms. Anderson to a position in Final Finish, the Company would have had to remove someone else from a position in that area. Although Mr. Weiers had the authority at that time to transfer one employee out of a department and another individual into a department, and thus had authority to transfer Ms. Anderson into the Hardware Department and out of the Wall Department, such transfers do not occur very often at Schult. T. 353, 368-69.

47. By the time of her termination, Ms. Anderson had not been officially transferred out of the department supervised by Mr. Parris and into the department supervised by Mike Schultz because Joel Bill, the person whose job she was going to be filling, did not actually end his employment prior to the time that Ms. Anderson was terminated. T. 340. Mr. Bill eventually left his employment at Schult sometime in August, 1993. T. 345.

48. Ms. Anderson did not reapply for a job at Friendship Homes in Montevideo after her termination from Schult because she wanted to raise her children in the Redwood Falls area. T. 137.

49. Following her employment with Schult, Ms. Anderson worked as a road construction equipment operator with R & G Construction from July 20, 1993, to November 23, 1993, when the construction season ended and she was laid off. She earned about $8.00 per hour during this period and worked 12-hour shifts. She continued to have

problems with pain, discomfort, swelling, and numbness in her forearms during her work with R & G Construction. R & G Construction invited Ms. Anderson back to work the following spring. Ms. Anderson in fact went back for orientation and safety training meetings at R & G during the spring of 1994, but quit her job when she learned that most of the work would be in South Dakota since she did not want to relocate or leave her family during the work week. T. 112-14, 210-16, 228.

50. Ms. Anderson received unemployment compensation and did not look for work between November 23, 1993, and the time she was called back for orientation with R & G Construction in the spring of 1994 because she did not have a dependable car to drive to a job and she intended to go back to work in construction in the spring. T. 113, 134-35, 217. After being laid off at R & G, Ms. Anderson was forced to move from the home she was renting in Wabasso, Minnesota, and live in a rented farm house 15 miles from where her children attended school. T. 132-33.

51. From May, 1994, to July, 1994, Ms. Anderson again worked as a bartender in Lucan, Minnesota. She earned $5.00 per hour and worked 25-30 hours per week during this period, mostly on weekends and at night. She did not apply anywhere else before returning to the bar in Lucan. After leaving her job in Lucan, Ms. Anderson did not seek any other employment until September, 1994. T. 115, 117, 217-18.

52. In September, 1994, Ms. Anderson took a job as a bartender at the Firefly Creek Casino in Granite Falls, Minnesota. T. 115-16, 218. She initially worked mostly at night and on weekends, approximately 40 hours per week. Her starting pay was $5.50 per hour. T. 117. After the first month, she was promoted to bar manager. She earned $7.50 per hour during the first month of her work as bar manager, and then was increased to $8.00 per hour. T. 118. She earned overtime when she worked over 40 hours per week and received medical insurance benefits. She worked seven days a week and 18-hour shifts some days. T. 118, 218. Ms. Anderson continued to work at the Firefly Creek Casino until May, 1995, when she quit for approximately two weeks. T. 118, 219. Ms. Anderson then returned to the Firefly Creek Casino manager position. She quit that position on August 15, 1995, in order to avoid being away from her family on nights and weekends. T. 118-19, 219-20. While Ms. Anderson was employed at Firefly Creek, she did not apply for any other jobs in construction, manufacturing, or elsewhere. T. 219.

53. After leaving her employment at the Casino on August 15, 1995, Ms. Anderson applied for a full-time job at a corn plant in Marshall, Minnesota. She decided not to work there after completing a three-day orientation because she believed that there were dangerous chemicals at the plant and there had been some chemical leaks. T. 220-21.

54. On September 15, 1995, Ms. Anderson was again re-employed at Firefly Creek Casino, working in the surveillance department. She worked 40-hours per week by working nights and weekends, and remained in this position until the end of November, 1995, when she resigned. T. 119-20, 219-21.

55. In November, 1995, just a few days after she resigned from the casino, Ms. Anderson began working at Zytec in a position involving the assembly of computer circuit boards. She initially operated a terminator machine and later a wave machine, and earned from $6.50 to $7.50 per hour between November 1995, and October, 1996. She received fringe benefits by March, 1996. Ms. Anderson left Zytec in October, 1996, because the department in which she was working was shut down. Although the company did have work for her, it was not machine operator work and would have involved a pay cut to $6.50 per hour. T 120-22, 221-23.

56. Ms. Anderson began working for Advertising Unlimited in Sleepy Eye in a position involving the binding of calendars during the fall of 1996, at a wage rate of $7.50 per hour. She was laid off one week before Christmas, 1996. Because she expected to be recalled during the summer after her lay-off, she did not look for work until June, 1997, when her unemployment compensation was close to running out. T. 122-23, 223, 244-45.

57. Ms. Anderson had difficulty performing her jobs at Zytec and at Advertising Unlimited due to pain in her wrists and forearms. T. 229-30.

58. Following her lay-off by Advertising Unlimited, Ms. Anderson was unemployed until the first part of July, 1997. During that time, she applied for work at Zytec, a restaurant in Tracy known as the Mediterranean Club, and a factory next to the Club which manufactured computer components. T. 224-25. She did not apply for construction jobs during that period, nor did she reapply to Firefly Creek Casino. T. 225. She reapplied to only one of her previous employers during this period of unemployment. T. 225.

59. In July, 1997, Ms. Anderson went back to work at Firefly Creek Casino in a waitress position. She remains employed there at the present time. She generally works from 8:00 a.m. to 4:00 p.m. Her wage rate started at $5.25 per hour and has now increased to $5.50 an hour. T. 123-24. She has not looked for any other kind of work since July, 1997. T. 234.

60. Ms. Anderson is not interested in being reinstated as an employee at Schult Homes. T. 386.

61. Ms. Anderson preferred working at Schult to the other jobs she has had since her termination because she was able to work there during weekdays, thereby enabling her to be at home with her children at night and on weekends. Until recently, when her oldest daughter obtained her driver's license, her children could not be involved in sports and other extracurricular activities if she was not there to take them or pick them up. T. 130-32.

62. In 1993, Ms. Anderson earned $12,948 in wages and $348 in unemployment compensation. Schult paid her $2,638.28 in wages during 1993; R & G Construction paid her $7,813.05 in wages; and the Lucan bar paid her $2,497.32 in wages. T. 127-29. In 1994, Ms. Anderson earned $7,819 in wages and $1,294 in

unemployment compensation. T. 127-28. During 1995, Ms. Anderson earned $16,344 in wages. T. 255-56. During 1996, Ms. Anderson earned $14,081 in wages. T. 127. During 1997, Ms. Anderson earned $5,374 in wages and $7,122 in unemployment compensation. T. 126-27.

63. While working as a general laborer at Schult, Ms. Anderson was paid at the rate of $6.50 per hour. This rate of pay was increased between July, 1993, and the date of the hearing in the following amounts: July, 1995 - $6.75 per hour; July, 1996 - $7.00 per hour; July, 1997 - $7.40 per hour. T. 300-01; Ex. 4 (Response to Interrogatory No. 9). In addition, general laborers received a bonus on the basis of the units of manufactured homes produced in a given period. The bonus is added onto each person's hourly wage. T. 272-74; Ex. 4 (Response to Interrogatory No. 9).

64. During the period in which Ms. Anderson worked at Schult, the Company was not a union shop. Schult generally used a seniority system to determine lay-offs, if everything else was the same, but not to control the Company's ability to move an employee from one department to another. The seniority system thus did not prevent the Company from transferring Ms. Anderson from the Walls Department to the Hardware Department. T. 277-78.

65. The employee manual in effect at Schult during Ms. Anderson's employment did not contain any information for employees concerning how to request a reasonable accommodation for a disability or to whom such a request should be made. T. 274; Ex. 6F. Although Schult gave its supervisors a policy prior to 1993 addressing the need to accommodate workers with disabilities, there is no evidence that the Company provided its supervisors with training on that subject at that time other than merely handing out the policy and reviewing it with the supervisors. T. 275-76.

66. Ms. Anderson engages in normal recreational activities, gardening, housework, and child-rearing activities. T. 232-34. There have been no changes over the past five years in her recreational activities. T. 233. Although her wrists and forearms have not stopped bothering her, they have gotten a lot better. T. 228.

67. On or about February 9, 1994, Ms. Anderson filed a charge with the Minnesota Department of Human Rights alleging that the Respondent had discriminated against her in employment on the basis of sex. On or about April 19, 1996, the charge was amended to include an allegation that the Respondent had also discriminated against her on the basis of disability. On or about August 16, 1996, the Commissioner of Human Rights or her delegate made a finding that there was probable cause to believe Ms. Anderson's allegations that Schult had engaged in an unfair discriminatory practice. Ex. 2 (Responses to Requests for Admissions Nos. 20, 22); Answer to Complaint, ¶ 3; Post-Hearing Submission of Charges and Probable Cause Finding. Ms. Anderson hired an attorney to assist her in pursuing her charge of discrimination. T. 242-43.

68. On January 28, 1997, the Commissioner of the Minnesota Department of Human Rights through her attorney conducted a settlement conference and thereafter

conducted settlement negotiations. Answer to Complaint, ¶ 3. The case was not resolved.

69. The Complainant filed a Notice of and Order for Hearing and Complaint in this matter on October 3, 1997, thereby commencing this contested case proceeding.

70. The parties waived the requirement set forth in Minn. Stat. § 363.071, subd. 2 (1996), for personal service on Schult and service by registered or certified mail on the Complainant, and agreed that service by first class mail on both parties would be sufficient.

71. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

72. Any Finding of Fact more properly termed a Conclusion is hereby adopted as such.

Based on the foregoing Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS

1. The Administrative Law Judge has jurisdiction in this matter pursuant to Minn. Stat. §§ 363.071 and 14.50 (1996).

2. Proper notice of the hearing was timely given, and all other relevant substantive and procedural requirements of law and rule have been fulfilled.

3. At the times relevant to this proceeding, Respondent Schult Homes Corporation was an "employer" within the meaning of Minn. Stat. § 363.01, subd. 17 (1996), and the Charging Party, Susan Rathman Anderson, was an "employee" within the meaning of Minn. Stat. § 363.01, subd. 16 (1996).

4. The Minnesota Human Rights Act ("MHRA") prohibits covered employers from discharging or discriminating against an employee with respect to terms, conditions, or privileges of employment because of disability, except when based on a bona fide occupational qualification. Minn. Stat. § 363.03, subd. 1(2) (1996).

5. The term "disability" is defined in Minn. Stat. § 363.01, subd. 13 (1996), to mean "any condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such an impairment; or (3) is regarded as having such an impairment."

6. The term "qualified disabled person" in the context of employment is defined in Minn. Stat. § 363.01, subd. 35 (1996), to mean "a disabled person who, with reasonable accommodation, can perform the essential functions required of all applicants for the job in

question . . . ." The statute further specifies that, "[I]f a respondent contends that the person is not a qualified disabled person, the burden is on the respondent to prove that it was reasonable to conclude the disabled person, with reasonable accommodation, could not have met the requirements of the job or that the selected person was demonstrably better able to perform the job."

7. The Minnesota Human Rights Act further provides that it is an unfair employment practice for an employer with more than 25 employees as of July 1, 1992, "not to make reasonable accommodation to the known disability of a qualified disabled person or job applicant unless the employer . . . can demonstrate that the accommodation would impose an undue hardship on the business . . . ." Minn. Stat. § 363.03, subd. 1 (6) (1996). The statute goes on to state:

> "Reasonable accommodation" means steps which must be taken to accommodate the known physical or mental limitations of a qualified disabled person. "Reasonable accommodation" may include but is not limited to, nor does it necessarily require: (a) making facilities readily accessible to and usable by disabled persons; and (b) job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and the provision of aides on a temporary or periodic basis.
>
> In determining whether an accommodation would impose an undue hardship on the operation of a business or organization, factors to be considered include:
>
> (a) the overall size of the business or organization with respect to number of employees or members and the number and type of facilities;
>
> (b) the type of the operation, including the composition and structure of the work force, and the number of employees at the location where the employment would occur;
>
> (c) the nature and cost of the needed accommodation;
>
> (d) the reasonable ability to finance the accommodation at each site of business; and
>
> (e) documented good faith efforts to explore less restrictive or less expensive alternatives, including consultation with the disabled person or with knowledgeable disabled persons or organizations.

Id.

8. The U.S. Supreme Court first set forth a framework for the analysis of Title VII discrimination charges in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under the McDonnell Douglas case and its progeny, the Complainant has the burden to establish a prima facie case of discrimination creating a rebuttable inference of discrimination. If the

Complainant establishes a prima facie showing, the burden of production shifts to the Respondent, who must articulate legitimate, nondiscriminatory reasons for the actions alleged to be discriminatory. If the Respondent articulates legitimate, nondiscriminatory reasons for its actions, the Complainant may present evidence showing that the reasons articulated are a mere pretext for discrimination or are otherwise unworthy of belief. The McDonnell Douglas analytic framework must be followed in cases arising under the Minnesota Human Rights Act as well. See, e.g., Sigurdson v. Isanti County, 386 N.W.2d 715, 719-20 (Minn. 1986).

9. The burden of proof in an action involving violations of the Minnesota Human Rights Act remains at all times with the Complainant, who must establish by a preponderance of the evidence that the Respondent engaged in unlawful discrimination. Sigurdson, 386 N.W.2d at 720 n. 12.

10. The Complainant has established by a preponderance of the evidence that Schult Homes Corporation discriminated against Ms. Anderson on the basis of perceived disability when it discharged her from employment. The Complainant established a prima facie case of disability discrimination, the Respondent articulated legitimate, nondiscriminatory reasons for its actions, and the Complainant demonstrated that the reasons articulated are a mere pretext for discrimination or otherwise are unworthy of belief or, in the alternative, that disability discrimination was a discernible and causative factor in making the decision to discharge the Charging Party.

11. Respondent's discharge of the Charging Party constituted an unfair discriminatory practice within the meaning of Minn. Stat. § 363.03, subd. 7, which was undertaken in deliberate disregard of the Charging Party's rights under the Human Rights Act.

12. Respondent failed to carry its burden of establishing that the Charging Party failed to mitigate her damages.

13. Minn. Stat. § 363.071, subd. 2, permits an award of compensatory damages up to three times the amount of actual damages sustained by the victim of discrimination. The Charging Party in the present case is entitled to an award of compensatory damages in the total amount of $25,414, which is two times her actual damages.

14. Under Minn. Stat. § 363.071, subd. 2, victims of discrimination are entitled to compensation for mental anguish and suffering due to discriminatory practices. In this case, the Charging Party endured mental anguish and suffering as a result of Respondent's discriminatory conduct and is entitled to compensation for mental anguish and suffering she has sustained in the amount of $5,000.

15. Under Minn. Stat. § 363.071, subd. 2, and the standards set forth in Minn. Stat. § 549.20, punitive damages may be awarded for discriminatory acts where there is clear and convincing evidence that the acts of the employer show a deliberate disregard for the rights or safety of others. Complainant has made the required showing. In this case the Charging Party is entitled to punitive damages in the amount of $5,000.

16. Minn. Stat. § 363.071, subd. 2, requires the award of a civil penalty to the State when an employer violates the provisions of the Human Rights Act. Taking into account the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Respondent, and whether the violation was intentional, the Respondent should pay a civil penalty to the State in the amount of $10,000.

17. Minn. Stat. § 363.071, subd. 7, requires the award of litigation and hearing costs of the Department of Human Rights unless payment of the costs would impose a financial hardship on Respondent. An award of litigation and hearing costs shall be made based upon an appropriate petition to be submitted by the Complainant.

18. Minn. Stat. § 363.071, subd. 1(a), permits the Administrative Law Judge to require Respondent to reimburse Complainant for reasonable attorney's fees and costs. An award of reasonable attorney's fees and costs shall be made based upon an appropriate petition to be submitted by the Complainant.

19. Minn. Stat. § 363.071, subd. 2, authorizes the Administrative Law Judge to order the Respondent to "cease and desist from the unfair discriminatory practice found to exist and to take such affirmative action as in the judgment of the administrative law judge will effectuate the purposes of this chapter." As specified in the Order below, it is appropriate to order the Respondent in this case to cease and desist from discriminatory practices and also to order the Respondent to prepare, disseminate, and train supervisors and department managers regarding policies with respect to disability discrimination.

20. Citation to exhibits or testimony in the foregoing Findings of Fact does not mean that all testimony or exhibits that support the Findings have been cited.

21. Any Conclusion more properly termed a Finding is hereby adopted as such.

22. These Conclusions are made for the reasons set forth in the Memorandum which follows. The Memorandum is incorporated herein by reference.

Based on the foregoing Conclusions, the Administrative Law Judge hereby makes the following:

## ORDER

IT IS HEREBY ORDERED that:

1. Respondent shall pay Ms. Anderson $25,414 as compensatory damages, and shall pay prejudgment interest on lost wages of $12,707 from July 12, 1993, in accordance with Minn. Stat. § 334.01 (1996).

2. Respondent shall pay Ms. Anderson $5,000 as damages for mental anguish and suffering.

3. Respondent shall pay Ms. Anderson $5,000 as punitive damages.

4. Respondent shall pay a civil penalty of $10,000 to the State of Minnesota by mailing a check payable to the General Fund of the State of Minnesota to the Commissioner of Human Rights.

5. Within thirty (30) days of the date of this Order, the Complainant shall file with the Administrative Law Judge and serve upon Respondent a petition and supporting affidavit(s) and other documentation, if any, supporting reimbursement for attorney's fees incurred in this matter and reimbursement of litigation and hearing costs incurred by the Department and the Attorney General. Any request for attorney's fees must be sufficient to allow the Judge to make findings consistent with the legal principles developed in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974). Respondent shall file its response to the petition with the Administrative Law Judge and serve its response on Complainant within twenty (20) calendar days of its receipt of the petition. The Judge will take such additional argument and/or evidence as is deemed appropriate and shall issue a Final Order setting the amount of attorney's fees and litigation and hearing costs to be paid by Respondent.

7. Respondent shall cease and desist from any further acts of disability discrimination in violation of the Minnesota Human Rights Act.

8. By December 1, 1998, Respondent shall prepare and distribute an appropriate written equal employment opportunity policy for inclusion in its employee handbook which includes a discussion of the prohibition in the Minnesota Human Rights Act against disability discrimination and the requirement that reasonable accommodation will be made for the known disabilities of a qualified employee or applicant, unless the accommodation would impose an undue hardship on Respondent. Respondent shall also develop and distribute to its employees understandable written policies and procedures which effectuate that policy.

9. Respondent shall arrange for its supervisors and department managers to undergo training by March 1, 1999, to enable them to respond properly to employees with disabilities and requests for accommodations made by employees with disabilities. At a minimum, such training shall include an eight-hour block of instruction taught by a person who is knowledgeable about the requiremrents of the Minnesota Human Rights Act.

10. All payments to be made hereunder shall be made within 30 days of the date of the Final Order.

Dated: October 9, 1998.

_____

BARBARA L. NEILSON
Administrative Law Judge

Reported: Tape-recorded hearing was transcribed by Jean Arends, Court Reporter, Reporters Diversified Services, Duluth, Minnesota.

## MEMORANDUM

The Charging Party, Susan Anderson, filed a charge alleging sex discrimination by Schult Homes Corporation with the Minnesota Department of Human Rights on or about February 9, 1994. On April 19, 1996, the charge was amended to include disability discrimination. The Department issued a probable cause determination on August 6, 1996. After conciliation efforts were unsuccessful, the Department initiated the present contested case proceeding on October 3, 1997.

In its complaint, the Department asserted that Schult Homes Corporation's decision to terminate Ms. Anderson's employment and its failure to make a reasonable accommodation for her known disability constituted unfair discriminatory practices in violation of Minn. Stat. § 363.03, subd. 1(2) and (6) (1996). These provisions of the MHRA specify that it is an unfair employment practice for an employer to discharge an employee because of disability or fail to make reasonable accommodation to the known disability of a qualified disabled person in situations where the accommodation would not impose an undue hardship of the business. In its post-hearing brief in this matter, the Department asserts that Schult Homes Corporation discharged Ms. Anderson from employment on July 12, 1993, because Schult perceived her to be disabled, and thereby violated the Minnesota Human Rights Act ("MHRA"). The Department contends that it is unnecessary to consider whether a reasonable accommodation of Ms. Anderson's perceived disability was required since Schult decided to terminate Ms. Anderson's employment "without an interactive dialogue and without learning that she did not have crippling arthritis."[1] Complainant's claims against Schult are asserted under the disparate treatment theory.

### I. Respondent's Motion to Dismiss under State v. RSJ

Ms. Anderson filed a charge with the Department of Human Rights on or about February 9, 1994. In the original charge, Ms. Anderson asserted that Schult Homes had discriminated against her in the area of employment based on sex. She alleged that she mentioned to Mr. Parris in June, 1993, that her hands and arms were becoming sore from the work she was doing. She asserted that her doctor told her that she had a common form of arthritis and recommended that she be placed on light duty. She contended that Mr. Parris at first indicated that he would move her to another position, but ended up sending her back to her prior job duties after only a short period. She alleged that, on June 16, 1993, Mr. Parris told her that he had to let her go because Schult did not want to be responsible for "crippling" her. She further asserted that Mr. Parris told her the next day that he had found a new position for her. Although she presented a doctor's note calling for a light duty position, she alleged that her requests for light duty were not honored, and she was eventually told that she was being terminated because the Company's doctor would not allow her to lift more than 25 pounds. She indicated that she "believe[d] my sex was a factor in the Respondent's actions" and was "aware of several male employees who have been allowed to work on light duty after suffering from work related and non-work related injuries."

Approximately twenty-six months later, on or about April 19, 1996, Ms. Anderson amended the charge to state that she had been discriminated against due to both sex and

disability. In addition to the allegations contained in the original charge, the amended charge asserted, inter alia, that Ms. Anderson had a record of arthritis and that she believed that Schult "failed to properly consider if my lifting restrictions could be reasonably accommodated and acted to terminate me because they believed I had an impairment which prevented my continued employment. I believe I am a qualified disabled person, who with reasonable accommodation, would be able to perform the essential functions of positions that were available and that I could have been reassigned to." All of the alleged discriminatory acts occurred in June-July of 1993, during Ms. Anderson's employment at Schult. Because the charge was filed within one year of the date the alleged discrimination occurred, the charge was timely filed.[2] Schult does not argue otherwise.

The Department rendered a probable cause determination with respect to Ms. Anderson's charges on August 16, 1996, approximately 30 months after the original charge was filed and four months after the amended charge was filed. The Department found that there was probable cause to believe that Schult violated Minn. Stat. § 363.03, subd. 1(2)(b) and (c) and (6). Based upon the substance of the probable cause determination, it appears that the Department found probable cause to believe that the Company had violated the MHRA's prohibition against disability discrimination in discharge and terms and conditions of employment and had failed to reasonably accommodate Ms. Anderson's disability.

In its Answer and in its post-hearing brief, the Respondent asserted that this claim is barred by the failure of the Department of Human Rights to make a probable cause determination within twelve months, under the reasoning in State v. RSJ, Inc.[3] In RSJ, the Minnesota Supreme Court considered whether a case should be dismissed in which the Department issued probable cause determinations on four discrimination charges 31 and 35 months after the charges were filed. The respondent in RSJ argued that the Department's failure to comply with Minn. Stat. § 363.06, subd. 4(1) (which specifies that "the commissioner shall make a determination within 12 months after the charge was filed as to whether or not there is probable cause to credit the allegation of unfair discriminatory practices"), coupled with the prejudice it suffered as a result, should be a jurisdictional bar to further proceedings. Although the Court did not find that the failure of the Department to make a timely probable cause determination barred further proceedings, the Court stated that the delay and any resulting prejudice "raise equitable defenses to be resolved by the ALJ."[4] The Court cautioned Administrative Law Judges considering such arguments to be "mindful that the relief, if any, granted to the respondent because of the MDHR's inaction may have an impact on the charging party" and further instructed that "[a]ny such impact should be minimized."[5] Accordingly, the Court held that "probable cause determinations made 31 months or more after a charge is filed are per se prejudicial to the respondent, requiring dismissal of the complaint . . . ."[6] The Court noted, however, that the ruling should only be applied on a prospective basis to "all human rights charges filed with the MDHR on or after the date of this opinion [August 29, 1996]."[7] The Court further indicated that, "in all cases where the [Department of Human Rights] fails to make a determination of probable cause within 12 months after the filing of a charge, a respondent may seek appropriate relief from the administrative law judge" and that the relief ordered by the Judge "should be in proportion to the prejudice suffered by the respondent and may include dismissal of the complaint."[8]

Because the probable cause determination in this case was issued by the Department on August 16, 1996, prior to the issuance of the RSJ decision, and because, in any event, the probable cause determination was rendered approximately 30 months after the charge was filed (not 31 months or more), the RSJ decision is not strictly applicable and there is no requirement that the Department's delay be found to have been per se prejudicial to Schult. The reasoning of RSJ does, however, require the Judge to consider whether Schult is entitled to "appropriate relief" due to the Department's failure to issue the probable cause determination within 12 months after the charge was filed. As the Supreme Court indicated in RSJ, such relief "should be in proportion to the prejudice suffered by the respondent and may include dismissal of the complaint."[9]

Schult merely argues that it is entitled to dismissal of the complaint as a matter of law because the passage of time is per se prejudicial.[10] There is no allegation by Schult that it did not receive adequate notice of Ms. Anderson's allegations in a timely fashion or that it suffered any actual prejudice as a result of the Department's delay in rendering the probable cause determination. To the contrary, it appears that the Company was fully notified of the facts underlying Ms. Anderson's charge within seven months after her employment at Schult and had a reasonable opportunity to retain counsel and maintain evidence relating to her charge. It does not appear that any relevant documents were lost. The primary persons who made decisions affecting Ms. Anderson's employment at Schult, Mr. Parris and Mr. Weiers, testified at length during the hearing and are still working for Schult. Although witnesses for both parties at times could not recall the exact conversations that occurred, that is frequently the case in litigation, even in cases that proceed in an expeditious fashion to trial. Under these circumstances, Schult has not demonstrated facts that would justify the extreme remedy of dismissal of the complaint.[11]

## II. Respondent's Motion to Dismiss under Karst v. F.C. Hayer Co.

In its Answer, its oral Motion to Dismiss made during the hearing at the close of the Department's case, and its post-hearing brief, Schult argued that the Department's claims are barred by the exclusivity provision of the Minnesota Workers' Compensation Act. That provision states in relevant part that "[t]he liability of an employer prescribed by this chapter is exclusive and in place of any other liability to such employee, personal representative, surviving spouse, parent, any child, dependent, next-of-kin, or other person entitled to recover damages on account of such injury or death."[12] Schult relies primarily upon Karst v. F.C. Hayer Co.[13], as support for this argument.

In Karst, the Minnesota Supreme Court considered whether the exclusivity provision precluded an action for disability discrimination under the MHRA in a situation where the employee became disabled as a result of work-related injuries and the employer refused to hire him because of the disability. The employee in Karst had worked as a warehouseman for the company for more than thirty years. In December, 1978, Mr. Karst injured his left shoulder at work and was found to have a 5% permanent partial disability for purposes of workers' compensation. He returned to work in June, 1980, and was able to perform his warehouseman duties in a satisfactory manner for more than four years. In July, 1984, Mr. Karst suffered a second work-related injury to his left shoulder, was unable to work for a period of time, and began receiving workers' compensation benefits. In May,

1985, Mr. Karst's doctor released him to return to work with certain restrictions, but the company refused to allow him to return unless his doctor removed all restrictions In September, 1985, his doctor determined that Mr. Karst had reached "maximum medical improvement" and found that he had an additional 3% permanent partial disability. In the doctor's opinion, it would have been in Mr. Karst's best interest to return to his old job, but work within his restrictions. Mr. Karst attempted to get his employer to rehire him in the fall of 1985. In January, 1986, the Company formally refused to rehire him unless all restrictions were removed, and he sued for disability discrimination.

The Supreme Court determined that the exclusive remedy provision was "part of the quid pro quo of the workers' compensation scheme in which the employer assumes liability for work-related injuries without fault in exchange for being relieved of liability for certain kinds of actions and the prospect of large damage verdicts."[14] The Court reasoned that the fact that the Workers' Compensation Act requires employers to pay additional benefits if they do not rehire an injured worker constitutes evidence that the Legislature intended that the Workers' Compensation Act provide a remedy for discriminatory refusals to hire. In addition, the Court noted that it has held in the past that a party with multiple remedies who elects to recover workers' compensation is barred from recovering under other theories. The Court emphasized that Mr. Karst did not lack a remedy and that he had already collected over $200,000 in workers' compensation. Moreover, the Court expressed concern that exposing an employer to both workers' compensation claims and liability under the MHRA would impose a "tremendous financial burden"[15] on them. The Court thus declined to find that the MHRA was applicable under the circumstances of the case.

Since Karst, several other cases have been decided involving the interplay between MHRA claims and the workers' compensation exclusive remedy provision. In Hunter v. Nash Finch Co.,[16] upon which the Department relies, an employee who had lost two fingers on his left hand in a 1981 workplace accident at a prior job was held not to be precluded from bring a discrimination action against his subsequent employer, Nash Finch, for failure to accommodate his disability. The employee had developed carpal tunnel syndrome in his right hand while working for Nash Finch and had received workers' compensation benefits for that medical problem. He later filed an action under the MHRA alleging that the two amputated fingers on his left hand constituted a disability and Nash Finch had failed to accommodate that disability. The Court of Appeals determined that the exclusive remedy provision contained in the Workers' Compensation Act did not bar an employee with a pre-existing disability from bringing a separate discrimination action under the MHRA for failure to accommodate the pre-existing disability. The Court concluded that the discrimination action was separate and distinct from the workers' compensation claim because the discrimination claim was not based upon the injury for which the employee had received benefits, but rather was based upon Nash Finch's refusal to reasonably accommodate the employee. The Court pointed out that "[t]he failure to accommodate [the employee's] disability gave rise to the discrimination claim months before he developed carpal tunnel syndrome, and the injuries sustained from this discrimination can be separated from the subsequent physical injury."[17] The Court also emphasized that the Workers' Compensation Act does not provide a remedy for a failure-to-accommodate claim under the MHRA, unlike

the situation in Karst. The Court acknowledged that Nash Finch might be exposed to an increased financial burden if it had to defend against both the MHRA and workers' compensation claims, but indicated that "such increased exposure is not the result of erosion of the WCA's exclusivity provision" but because "such provisions do not apply to altogether different damages for which no remedy is provided under the WCA."[18]

In Benson v. Northwest Airlines, Inc.,[19] the employee filed a workers' compensation claim for aggravation of a shoulder condition and received benefits. After being placed on 90-days unpaid leave and terminated when he failed to find another position at Northwest, the employee brought a lawsuit claiming, among other things, discriminatory discharge in violation of the federal Americans with Disabilities Act. The district court denied the employee's motion to amend his complaint to add a claim under the MHRA. The Court of Appeals affirmed, relying on Karst. The Court held that the employee was precluded from pursuing an MHRA claim because he "filed and eventually recovered benefits on, a workers' compensation claim."[20] The Court noted that the same disability (aggravation of his shoulder injury) formed the basis for both his workers' compensation claim and the discrimination claim, and distinguished Hunter on the grounds that Mr. Hunter's workers' compensation claim related to a separate injury (carpal tunnel syndrome) than the disability involved in his discrimination claim (failure to accommodate his earlier loss of two fingers).[21]

Unlike the plaintiffs in the Karst and Benson cases, Ms. Anderson did not elect a workers' compensation remedy. She did not file a workers' compensation claim or recover benefits. In fact, Ms. Anderson specifically denies that she is, in fact, disabled. The basis of her discrimination claim is that Schult terminated her based upon its perception that she is disabled. Consequently, Ms. Anderson's discrimination claim (termination based on perceived disability) is separate and distinct from any workplace injury she may have suffered. It is Schult's perception of her medical condition, and not any actual injury, that forms the basis of her discrimination claim. The decisions in both Karst and Benson emphasize the fact that the employees had filed for and received workers' compensation benefits for the workplace injury at issue. In addition, unlike Karst and Benson, Ms. Anderson's discrimination claim is based on her employer's misperception that she suffered from crippling arthritis. It would be absurd to require that Ms. Anderson's only redress be through the workers' compensation system where she does not believe that she has a disabling injury. Finally, the Workers' Compensation Act does not provide Ms. Anderson with a remedy. She is seeking monetary relief to compensate her for discriminatory conduct, not medical benefits. Consequently, her only remedy in this case lies with the MHRA. Accordingly, the Karst and Benson cases are distinguishable, and it would not be appropriate to preclude Ms. Anderson from pursuing her claim under the MHRA.

## III. McDonnell Douglas Analysis

Minnesota courts have often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 and other federal anti-discrimination laws in interpreting the provisions of the MHRA. Relevant Minnesota case law establishes that plaintiffs in employment discrimination claims arising under the

Act may prove their case either by presenting direct evidence of discriminatory intent or by presenting circumstantial evidence in accordance with the analysis first set out by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973).[22]

The approach set forth in McDonnell Douglas consists of a three-part analysis which first requires the Complainant to establish a prima facie case of disparate treatment based upon a statutorily-prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the Respondent unlawfully discriminated against the Complainant. The burden of producing evidence then shifts to the Respondent, who is required to articulate a legitimate, nondiscriminatory reason for its treatment of the Complainant. The Respondent's burden is light at this stage; it is not required to prove that it was actually motivated by the reason offered.[23] The issue is whether there is evidence that the Respondent's actions were related to a legitimate business purpose.[24]

If the Respondent demonstrates a legitimate, nondiscriminatory reason, the burden of production shifts back to the Complainant to demonstrate that the Respondent's claimed reasons are a mere pretext for discrimination.[25] The Complainant may sustain this burden either directly, by persuading the fact-finder that a discriminatory reason more likely motivated the employer, or indirectly, by showing that the explanation proffered by the employer is unworthy of credence.[26] Indirect proof of discrimination is permissible to show pretext, since "'an employer's submission of a discredited explanation for firing a member of the protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred.'"[27] The burden of proof remains at all times with the Complainant, who bears the ultimate burden of persuading the fact-finder by a preponderance of the evidence that the Respondent intentionally discriminated against him.[28] Even if the trier of fact finds the reasons offered by the employer not to be credible, the Complainant does not automatically prevail. The Complainant must still satisfy the ultimate burden of persuasion and show intentional discrimination.[29]

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged, and must be tailored to fit the particular circumstances. The Department has alleged that Schult discriminated against Ms. Anderson on the basis of "perceived" disability. The following sections will discuss whether the Complainant demonstrated a prima facie case of disability discrimination; if so, whether Schult articulated legitimate, nondiscriminatory reasons for its treatment of Ms. Anderson; and, finally, whether the Department established that the asserted reasons were a mere pretext for discrimination.

### A. Prima Facie Showing

The Department asserts that Schult perceived Ms. Anderson to be disabled and terminated her based upon that perception, thereby treating her differently than employees it perceived to be non-disabled. The Minnesota Human Rights Act ("MHRA") provides in pertinent part that it is an unfair employment practice for an employer "to discriminate against a person with respect to . . . discharge . . ." because of disability, unless based on a bona fide occupational qualification ("BFOQ").[30] The term "disability" is defined as "any

condition or characteristic that renders a person a disabled person. A disabled person is any person who (1) has a physical, sensory, or mental impairment which materially limits one or more major life activities; (2) has a record of such impairment; or (3) is regarded as having such an impairment."[31] Thus, as the Minnesota Supreme Court has acknowledged, "[i]mpairments that are not materially limiting but are perceived and treated as such will be deemed to be materially limiting."[32] The MHRA originally required that the impairment "substantially" limit one or more life activities. This requirement corresponded to the federal standard set forth in the federal Vocational Rehabilitation Act of 1973 and the Americans with Disabilities Act.[33] The MHRA was amended in 1989 to specify that the impairment must "materially" limit one or more life activities, thereby substituting a less stringent standard.[34]

As noted above, Minnesota courts interpreting the MHRA have often relied upon case law developed in discrimination cases arising under federal law.[35] Because the language used to define a "handicapped individual" in section 504 of the Rehabilitation Act is nearly identical to the definition contained in the MHRA, Minnesota courts have held that it is appropriate to look to interpretations of the Rehabilitation Act for guidance in construing the definition of "disabled person" and "qualified disabled person" under the MHRA.[36] Since Congress intended that interpretations arising under the Rehabilitation Act be applied in deciding what constitutes a "disability" as used in the ADA[37] and the guidelines issued by the Equal Employment Opportunity Commission under the ADA rely heavily upon the definitions developed under the Rehabilitation Act,[38] it is equally appropriate to rely upon interpretations of the ADA in construing provisions of the MHRA.

As mentioned above, a plaintiff may establish a prima facie case of discrimination either by presenting direct evidence of discriminatory motive or, in the alternative, by showing that there is indirect evidence of the existence of a discriminatory motive by satisfying the McDonnell-Douglas multi-prong test.[39] The McDonnell Douglas test was merely formulated "to aid in discovering discrimination where only circumstantial evidence is available."[40]

In the present case, the Department has presented sufficient direct evidence of Schult's intent to discriminate against Ms. Anderson based on perceived disability to establish a prima facie case. For example, the Department presented evidence that Ms. Anderson was initially told that she would be terminated the same morning that she told Mr. Parris (her immediate supervisor) that she had been diagnosed with a common form of arthritis. Mr. Parris told her that the termination was necessary because she had arthritis and the Company did not want to be responsible for crippling her. Approximately three weeks later, after she was rehired, Ms. Anderson was, in fact, fired from her position. During her termination interview, she was told by Mr. Weiers that she had been diagnosed as having crippling arthritis. Mr. Weiers also stated that the Company had too many people on workers' compensation and did not need another one, the Company did not want to "cripple" her, and they were going to let her go for her own good. The Separation Notice and the Payroll Change Notice form both noted that Ms. Anderson had been terminated because she could not perform her duties "due to arthritis." These oral and written statements directly demonstrate an overt intent to discriminate based on the Company's perception that Ms. Anderson had crippling arthritis.

Even if the Department had not established a prima facie case by direct evidence of discrimination, the Department established a prima facie case indirectly under the traditional multi-prong prima facie case formula. The elements of the prima facie case must be modified to fit the circumstances of the case under consideration.[41] In order for an employee to make out a prima facie case of disability discrimination in discharge, it is appropriate to require the employee to show the following:

(1) The employee belongs to a protected class;

(2) The employee was qualified for the position held;

(3) Despite the employee's qualifications, the employee was discharged; and

(4) The employee was replaced.[42]

It is undisputed that Ms. Anderson was discharged, thus satisfying the third prong of the prima facie case requirement. There was testimony that the Company was hiring additional personnel during the first six months of 1993, and Schult admitted in its answers to interrogatories that two general laborers were hired between the date of Ms. Anderson's discharge and August 15, 1993.[43] This information is sufficient to satisfy the fourth prong of the prima facie case requirement.

The parties are at odds concerning whether the first and second prongs of the prima facie case requirement have been shown. Schult argues at length in its post-hearing brief that Ms. Anderson does not have a physical, sensory, or mental impairment which materially limits one or more major life activities, and thus is not "disabled" under the first part of the definition set forth in the MHRA.[44] Schult accurately points out that Ms. Anderson has held a variety of jobs both before and after her job at Schult and that there is no evidence that her problems with her hands and forearms have in fact materially limited her in the major life activity of working or in any other major life activity. In its post-hearing submissions, however, the Department makes it clear that it is not arguing that Ms. Anderson is disabled within the meaning of the first part of the MHRA definition; rather, the Department asserts that Ms. Anderson is a protected class member because she was "regarded as" having a physical, sensory, or mental impairment which materially limits one or more major life activities, within the third part of the MHRA definition.[45]

The Department's major argument, then, is that Ms. Anderson, although not in fact disabled, is a member of the protected class under the first prong of the prima facie case requirement because she was regarded by the Company as being disabled. In response, Schult contends that the requisite showing was not made because "there is no evidence in the record other than complainant's own unsupported testimony supporting the claimed 'perception' of disability."[46] Schult further argues that the Department has not established that the Company believed both that Ms. Anderson was unable to perform the functions of a particular job and that her disability materially limited her access to a class or broad range of jobs.

The "regarded as" language was included in the federal Americans with Disabilities Act (ADA) because "Congress intended to protect people from a range of discriminatory

actions that are based on myths, fears, and stereotypes about disability, which occur even when a person does not have a substantially limited impairment."[47] In School Board of Nassau County v. Arline,[48] the U.S. Supreme Court emphasized that even in instances where an individual's impairment does not in fact substantially limit a major life activity, the reactions of other people may prove to be a stumbling block to employment: "Such an impairment might not diminish a person's physical or mental capabilities, but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." The Court indicated that, by including the "regarded as" provision in the Rehabilitation Act of 1973, "Congress acknowledged that society's accumulated myths and fears about disability and diseases are as handicapping as are the physical limitations that flow from actual impairment."[49]

It is evident that arthritis and, by extension, arthraligia and "crippling" arthritis, fall within the definition of an "impairment" for purposes of the MHRA and the related federal laws. The interpretive guidance issued by the EEOC under the ADA recognizes that "physical or mental impairment" includes "[a]ny physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of several body systems . . . ."[50] Arthritic conditions would certainly meet this requirement. Moreover, the EEOC interpretive guidance expressly acknowledges that "various medical conditions commonly associated with age, such as hearing loss, osteoporosis, or arthritis, would constitute impairments within the meaning of this part."[51]

The more difficult question here is whether the Department has adequately established a prima facie case that Schult regarded Ms. Anderson as having an impairment that materially limited a major life activity. The MHRA does not define what is meant by the phrase "materially limits a major life activity." The guidelines promulgated by the EEOC under the ADA and the Appendix following the guidelines do, however, provide guidance concerning the interpretation of the phrase "major life activity" and the more stringent federal standard requiring that the impairment "substantially limit" one or more major life activities. These guidelines define "major life activities" as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[52] Pursuant to the EEOC guidelines, an impairment is viewed as substantially limiting major life activities if it "significantly restrict[s] . . . the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[53] The EEOC definition of "major life activity" is identical to that contained in a regulation promulgated by the Department of Health and Human Services which was considered and accorded deference by the U.S. Supreme Court in School Board of Nassau County v. Arline.[54]

With respect to limitations on the major life activity of working, the EEOC interpretive guidance is once again instructive:

> [A]n individual is not substantially limited in working just because he or she is unable to perform a particular job for one employer, or because he or she is unable to perform a specialized job or profession requiring extraordinary skill, prowess or talent. . . . [A]n individual does not have to be totally unable

> to work in order to be considered substantially limited in the major life activity of working. An individual is substantially limited in working if the individual is significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes, when compared with the ability of the average person with comparable qualifications to perform those same jobs. For example, an individual who has a back condition that prevents the individual from performing any heavy labor job would be substantially limited in the major life activity of working because the individual's impairment eliminates his or her ability to perform a class of jobs. This would be so even if the individual were able to perform jobs in another class, e.g., the class of semi-skilled jobs.

29 C.F.R. §1620.2(j), App. (emphasis added). Under this guideline and also under relevant Minnesota case law,[55] if the Department showed only that Schult regarded Ms. Anderson as being disqualified from the single job of general laborer in the Walls Department of its plant, it would have failed to make the requisite showing that the perceived impairment materially limit the major life activity of working.

After a careful consideration of the record as a whole, the Judge has concluded that the Department demonstrated that Ms. Anderson was, in fact, regarded by Schult as having a physical impairment which materially limited one or more major life activities and that Ms. Anderson thus is a member of the class of persons protected by the MHRA. The evidence adduced at the hearing showed that both Mr. Parris and Mr. Weiers viewed Ms. Anderson as having not only the impairment of arthritis, but also a form of arthritis that would "cripple" her. Ms. Anderson's testimony in this regard was bolstered by that of Mr. Parris, who asserted in hearing testimony that he had been "led to believe" on June 16-17 that Ms. Anderson had a crippling form of hereditary arthritis that was confirmed by a second medical opinion, and acknowledged that he also told Mr. Weiers this information.[56] During the meeting on June 16 when Mr. Parris first terminated Ms. Anderson, he told her that the Company didn't want to be responsible for "crippling" Ms. Anderson and that it was necessary to terminate her employment "for [her] own good." Later, when Ms. Anderson was terminated a second time, Mr. Weiers also told her that she "had a case of crippling arthritis" and was not able to lift 25 pounds.[57] Ms. Anderson testified that Mr. Weiers "made it sound as if I would never lift more than 25 pounds again in my life."[58] He also said that "he had had already too many people on workman's comp. and they didn't need another one in that area or in that -- in that company. And that for my own good again they were going to let me go and that the company, for the second time I heard, did not want to cripple me."[59] The claim that the Company perceived Ms. Anderson as disabled is also supported by the language included in the Separation Notice and the Payroll Change Notice forms, which both noted that Ms. Anderson had been terminated because she could not perform her duties "due to arthritis." As a result, the Department has shown that Schult regarded Ms. Anderson as disabled because it viewed her as having a condition which would cause her to become "crippled" if she continued to perform duties as strenuous as those in the Hardware Department or those involving the lifting of more than 25 pounds. The common understanding of the meaning of the word "crippled" would involve a material impairment of the musculoskeletal system.

Moreover, the Department presented evidence that both Mr. Parris and Mr. Weiers viewed Ms. Anderson's physical condition as one that would greatly interfere with her ability to engage in the major life activity of working in terms of the effect it would have upon a broad range of jobs and not just the single job of general laborer in the Walls Department. As discussed above, they believed that Ms. Anderson suffered from crippling arthritis. In addition, although the form completed by the Company doctor, Dr. Angstman, merely indicated that Ms. Anderson should not lift more than 25 pounds during the next two weeks, Mr. Weiers made it sound like Ms. Anderson would never again in her life lift more than 25 pounds. In addition, the Company apparently determined that Ms. Anderson was not even capable of performing the position in the Hardware Department, even though (1) Mr. Parris and Mr. Weiers admitted that they did not inquire of the supervisor in the Hardware Department how well Ms. Anderson was doing, and (2) the position in the Hardware Department did not involve lifting more than 25 pounds and, in fact, most if not all of the lifting was under 10 pounds.[60] Based upon the Company's perception that Ms. Anderson was permanently unable to lift more than 25 pounds, Ms. Anderson would have been disqualified from holding many of the physical labor jobs she obtained both before and after her employment at Schult. As she testified at the hearing, most of these jobs have required her to lift more than 25 pounds on a regular basis. By virtue of her training and experience, Ms. Anderson has chosen to work in physical labor positions. It is evident that she would have been precluded from a wide range of heavy labor jobs if, in fact, she were permanently unable to lift more than 25 pounds. The inability to lift more than 25 pounds falls squarely within the EEOC guideline discussed above and is broader in scope than the restrictions involved in the Cooper, Sigurdson, and Fahey decisions.

For all of these reasons, the Judge concludes that the Department has shown that Ms. Anderson was a member of the protected class, and has thereby satisfied the first prong of the prima facie case formulation.

The remaining issue in connection with the prima facie case requirement is whether the Department has shown that Ms. Anderson was qualified to perform her job, thereby satisfying the second prong of the prima facie case test. Schult asserts that there has been no showing that Ms. Anderson was a "qualified disabled person" within the meaning of the MHRA, i.e., one who, "with reasonable accommodation, can perform the essential functions required of all applicants for the job in question."[61] Schult argues that Ms. Anderson was unable to perform the job for which she had been hired either with or without reasonable accommodation. The Company contends that, despite the vague requests for accommodation received from Ms. Anderson's doctors, Schult took reasonable steps to accommodate her. The Company claims that Ms. Anderson's job was modified by providing her with assistance in lifting and by removing her from doing "some stressful tasks."[62] Schult alleges, however, that "[e]ven after being assigned half days to the hardware job and after a three day holiday weekend Anderson had to leave work on July 6 because of her pain and was out, unable to work for the rest of the week. Anderson's doctors had not prescribed any job modification which Schult could have adopted to 'accommodate' her."[63] Schult thus contends that the Walls Department position was the job for which Ms. Anderson was hired and argues that the second prong of the prima facie case requirement has not been satisfied because she could not perform this job without having to miss days due to pain.

It is well established that a plaintiff "need only show that he met the minimum objective qualifications for the job" for purposes of satisfying the prima facie case requirement.[64] These qualifications are not necessarily limited to those specified in the position description.[65] In addition, the MHRA provides that, "[i]f a respondent contends that the person is not a qualified disabled person, the burden is on the respondent to prove that it was reasonable to conclude the disabled person, with reasonable accommodation, could not have met the requirements of the job or that the selected person was demonstrably better able to perform the job."[66]

Ms. Anderson was hired for the position of general laborer at Schult on May 14, 1993. She was initially placed in the Walls Department. Her training and experience were obviously deemed adequate at that time, and she thus possessed the basic qualifications for the job. She received favorable evaluations during the first five days of her position in the Walls Department, and after the first ten and thirty days of employment. In fact, there is no evidence that she ever received an unfavorable evaluation.

Ms. Anderson credibly testified that she was terminated from her position as a general laborer in the Walls Department on June 16, 1993, after she provided Mr. Parris with a doctor's note advising lighter duty and told him that she had been diagnosed with a common form of arthritis. She was rehired the next day to work as a general laborer in the Hardware Department. She had not been officially transferred to the Hardware Department by the time she was terminated, since the person whom she was to replace had not yet left the Company.

Despite the fact that she had been rehired to work in the Hardware Department, Ms. Anderson did not spend all of her workday in the Hardware Department after June 17. In fact, based upon Ms. Anderson's testimony and her attendance chart, it appears that she only was given the opportunity to work in the Hardware Department a maximum of five or six half-days prior to her termination.[67] She continued to work in the Walls Department the remainder of the time. If, as the Company contends, it meant to give Ms. Anderson a trial period in the Hardware Department to see if she could perform the job, this was hardly an adequate trial period. Moreover, as reflected in the Findings of Fact, Ms. Anderson's work in the Walls Department was not modified very significantly in response to her doctors' notes requesting that she be given lighter duty for two weeks. After a day or two, she was still expected to use a bar clamp and screw gun to pull in the exterior walls. She was free to ask her co-workers for assistance in lifting and could also use the hoist, but it took more time to use the hoist than it did to move the walls manually. In addition, due to the backlog of orders, employees were told to hurry up and work at a faster pace at that time. The bonus pay based on productivity also may have provided workers with a disincentive to use the hoist.

It is unclear whether an employer must provide reasonable accommodation to an employee who merely is "regarded as" having a disability.[68] Ms. Anderson was told from the beginning of her employment at Schult, however, that a less strenuous job would be found for her should the Walls Department position prove too strenuous. In addition, the Schult Employee Handbook, states that, "[i]f a physician imposes temporary or permanent work restrictions, the Company will make every effort to provide a 'light-duty' job,"[69]

thereby suggesting that the Company is willing to attempt to accommodate employees even in instances in which only temporary work restrictions are imposed. Once an employee has requested a reasonable accommodation, the employer is obligated to engage in a reasonable attempt to ascertain the appropriate accommodation through a flexible, interactive process.[70] That process did not occur here. Ms. Anderson provided the Company with three notes from three different doctors, all prescribing lighter duty for two weeks. Only Dr. Angstman, the Company doctor, specified a weight limitation (although the precise limitation was confusing) and none of the doctors made any recommendation concerning the nature of the duties that Ms. Anderson should perform during the two-week period. There is no evidence that the Company ever came back to Ms. Anderson and requested that she obtain more specific information from her doctors, or requested such specifics from Dr. Angstman, the Company doctor whom Ms. Anderson agreed to see. If reasonable accommodation is required for employees with perceived disabilities, it is questionable whether Schult provided Ms. Anderson with reasonable accommodation under these circumstances. If she had in fact been given the two weeks of lighter duty that her doctors had recommended, perhaps she could then have continued performing the Walls Department position without difficulty.

But it is not necessary to decide this issue for purposes of this case. The appropriate inquiry when determining whether the Department made out a prima facie case is whether Ms. Anderson was qualified to perform the essential functions of the Hardware Department position that she had been rehired to perform, not the Walls Department position. The Company had already decided that the Walls Department position was too strenuous for her, and had agreed to allow her to try the Hardware Department position. In fact, the Company's response to the Department's information request during the charge investigation indicated that Ms. Anderson "was reassigned to the Hardware position on June 28 . . . ."[71] Since Ms. Anderson had been hired by Schult as a general laborer and a decision had been made to have her try the Hardware Department position, she must have met the minimum qualifications for the position. Because the Hardware Department job required the lifting of only 10 to 25 pounds or less, the work was within either the 25-pound or the 50-pound restriction imposed by Dr. Angstman. Neither Mr. Parris not Mr. Weiers engaged in any discussion with Mike Schultz, the supervisor in the Hardware Department, prior to Ms. Anderson's termination to determine how well Ms. Anderson was performing the Hardware Department position.[72] The record thus is devoid of any evidence that Ms. Anderson was not qualified to perform the essential functions of that position.

The Judge concludes under these circumstances that Schult has not borne its burden to prove that it was reasonable to conclude that Ms. Anderson could not have met the requirements of the Hardware Department job. The Department has shown that Ms. Anderson was qualified for the position, and thus has demonstrated a prima facie case of discrimination based on perceived disability.[73]

### B. Legitimate, Nondiscriminatory Reasons and Pretext

Schult Homes articulated legitimate, nondiscriminatory reasons for its discharge of Ms. Anderson through the presentation of evidence that Ms. Anderson was unable to

perform her duties in the Walls Department and Hardware Department and was excessively absent. Because Ms. Anderson received favorable work evaluations[74] and there was no claim that Ms. Anderson's efficiency or work performance when she was at work was deficient, the Company's assertion largely boils down to a claim that a her inability to handle the jobs in the two departments led to excessive absences and justified her termination. As discussed in detail below, however, the Administrative Law Judge is persuaded based upon the entire record in this matter that (1) the reasons offered by Schult for Ms. Anderson's termination are not worthy of belief; or, in the alternative, (2) even if Ms. Anderson's attendance did play a part in the decision, discrimination based on perceived disability was still a discernible and substantial causative factor in her discharge.

As a threshold matter, and as reflected in the Findings of Fact, the Administrative Law Judge has generally credited the testimony of Ms. Anderson where it was at odds with that of Mr. Parris and Mr. Weiers. These credibility findings are based upon the relative demeanor of the witnesses during the hearing and their apparent memory of the incidents in issue. Ms. Anderson had excellent recall of the events that transpired and provided direct and forthright responses to the questions that were posed by counsel.[75] In contrast, the testimony of Mr. Parris and Mr. Weiers was vague and unclear with respect to several of their key meetings with Ms. Anderson. In most instances, they did not outright deny Ms. Anderson's version of the conversations, but merely indicated that they didn't recall that statement or didn't believe that they had said that. For example, Mr. Parris did not provide credible testimony concerning what transpired on June 16. He admitted that he did not "remember the exact context of anything that was discussed" in the conference room that day, and merely testified that he "doesn't believe" that there was any discussion about any change in Ms. Anderson's job or job status..[76] He also did not recall talking to Ms. Anderson by the time clock that morning, although he admitted that it was "very possible."[77] In contrast, Ms. Anderson provided detailed testimony regarding what had transpired on June 16. Moreover, there is documentation in the medical notes of Dr. Pogemiller that Ms. Anderson told him when she saw him the next day that she had "consulted with a doctor in Redwood Falls, who said that she had arthritis and got her fired from her job."[78] Thus, Ms. Anderson reported that she had been fired the day after the discussion, well before the filing of the discrimination charge and the hearing in this matter. She also brought her children with her to work on June 17, which she would not have been likely to do had she expected to return to work that day. The mere fact that Mr. Parris did not comply with typical Company procedures when he terminated Ms. Anderson on June 16 does not undermine Ms. Anderson's account of what happened that day.

The Company documents prepared at a time closer to the events in question in some instances were inconsistent with the hearing testimony of Mr. Weiers and Mr. Parris, further undermining their testimony. For example, Mr. Parris testified at the hearing that Ms. Anderson was never officially transferred to the Hardware Department position, but the Company's response to the MDHR during the charge investigation said that Ms. Anderson was transferred to that position as of June 28.[79] Mr. Weiers testified that he was unaware of the lifting restriction imposed by Dr. Angstman, but the Company's MDHR response indicated that Dr. Angstman "prescribed light duty, no lifting greater than 50 pounds" and the note from Dr. Angstman that was provided to

Schult and was quoted in Ms. Anderson's Payroll Change Notice indicated that Ms. Anderson should lift no more than 25 pounds.[80] For all of these reasons, the Administrative Law Judge has determined that it is appropriate to credit the testimony of Ms. Anderson where it conflicts with that of the Schult managers.

It is evident that "[a]ttendance problems may be a legitimate basis for an employer's decision to terminate an employee" and that the mere fact that an employee's absences were caused by an impairment or disability "does not automatically render [the employer's] articulated reason for her termination to be discriminatory."[81] Thus, in a case in which the employer had a well-known attendance policy, the position required four basic functions to be performed each day, and the employee was the only service clerk in her department, regular attendance was found to be an essential function of a job.[82] In the present case, however, there has been no such detailed showing. Although Mr. Weiers generally testified that the Company needed people at work every day to perform their jobs, there was no specific evidence concerning what, if any, detrimental effect would follow from the absence of a Hardware Department employee. Indeed, absences in the Hardware Department do not appear to be that rare, since each time Ms. Anderson worked in that Department prior to her termination, she was filling in for a missing employee. Moreover, it is likely that any inability of Ms. Anderson to come to work shortly before her discharge stemmed largely from the Company's insistence that she continue to spend part of her day in the Walls Department performing duties that had led to her problems with arthralgia. Furthermore, at least one of Ms. Anderson's absences was due to the injury she sustained after using a mitre saw in the Hardware Department that had a missing or damaged guard,[83] Thus, Ms. Anderson's attendance record at Schult cannot properly be said to be reflective of any difficulty she had in handling the duties of the Hardware Department position. Given the Company's decision to move her into that position after a trial period, it is Ms. Anderson's ability to handle the Hardware Department position that should have been the Company's primary concern when making the termination decision.

In addition, Mr. Weiers' testimony concerning the discussion that occurred when Ms. Anderson was terminated did not provide convincing evidence that the Company was simply motivated by Ms. Anderson's attendance record/ability to handle the job. First, there is no evidence that Ms. Anderson's attendance record was explicitly mentioned during the meeting on July 12 as a reason for her termination. Second, since Mr. Weiers admitted that he had no information at the time of the termination concerning how well Ms. Anderson was performing the Hardware Department position and the decision was made after Ms. Anderson had only worked in that Department for a very brief time, he could not have been taking her performance in that position into consideration at the time the termination decision was made. The Company representatives conceded that the lifting requirements in that position were within the 25-pound lifting restriction imposed by Dr. Angstman. Third, Mr. Weiers never denied making the statement that the Company was concerned about increased workers' compensation claims or the possibility that Ms. Anderson would become "crippled" by the job if she continued to work at Schult. It is apparent that Mr. Parris and Mr. Weiers both believed, despite the complete absence of supporting medical information, that Ms. Anderson had some form of crippling arthritis.[84] Finally, Mr. Weiers' assertion that Dr. Angstman never provided him with a diagnosis of Ms. Anderson's condition during their

telephone conversation prior to his making the termination decision and would not provide a definitive answer to the question of whether Ms. Anderson was physically able to perform her job at Schult[85] suggests that Mr. Weiers was not really interested in the doctor's assessment but simply wanted to avoid retaining an employee whom he perceived to be likely to file for workers' compensation in the future. The Company's purported reliance on Ms. Anderson's attendance record and ability to handle the job in reaching its decision to fire Ms. Anderson thus appears to be a mere pretext for discrimination.

Therefore, the credibility of the explanations proffered by Schult was significantly weakened by the unrefuted testimony of Ms. Anderson that Company representatives not only regarded her as having "crippling" arthritis but also expressed concern during the termination interview that she would become "crippled" if she continued to work at the Company and would file a worker's compensation claim, and further indicated that they were letting her go "for her own good." Despite Mr. Weiers' effort to disassociate himself from the remarks written on the Separation Notice and the Payroll Change Notice forms completed by other Company personnel, both of those forms emphasized that the reason for the termination was not simply inability to perform the job but rather the inability to perform "due to arthritis." It is evident that the perception that Ms. Anderson had crippling arthritis and stereotypical assumptions about what that would mean for her future ability to work prompted the decision to terminate her. As Ms. Sands told Mr. Weiers at the time she was completing the Separation Notice form, "we might as well call it what it is. Everything [that the Company had] says it's arthritis, call it arthritis." It is significant that Schult's concern about increased workers' compensation costs is itself a prohibited basis for making employment decisions.[86] All of this evidence taken together compels the conclusion that there was, in fact, a causal connection between the Company's mistaken perception that Ms. Anderson had crippling arthritis and the adverse employment action that was taken against her.

It is well established that, when a "substantial causative factor entering into the decision to discharge an employee" is based upon an impermissible factor, the MHRA affords an employee remedies against the employer, including damages.[87] Even though it is possible that Schult was motivated in part by Ms. Anderson's absence record and the difficulties she experienced in performing the Walls Department job, the record as a whole in this case supports the conclusion that Ms. Anderson's perceived disability was a discernible and substantial causative factor in her discharge from employment. The Administrative Law Judge thus concludes that the Complainant carried its overall burden of proving that Schult intentionally discriminated against Ms. Anderson.

## IV. Relief

Minn. Stat. § 363.071, subd. 2 (1996), authorizes an award of compensatory damages to the victims of discrimination under the MHRA. The general purpose of the damages provision is to make victims of discrimination whole by restoring them to the same position they would have attained had no discrimination occurred.[88] Persons complaining of discrimination do, however, "have the duty to minimize damages by using reasonable diligence in finding other suitable employment."[89]

Schult argues that Ms. Anderson failed to mitigate her damages when she decided not to return to her road construction job with R & G Construction during the spring of 1994 and made no attempt following her layoff from R & G Construction in November 1993 to seek other employment until May, 1994. Schult also contends that Ms. Anderson failed to act reasonably to mitigate her damages on other occasions by choosing to exhaust unemployment benefits before she began looking for a job and failing to seek work similar to the work she did at Schult or work in the housing construction or building construction industries. Schult urges that back pay be denied for these periods on the grounds that Ms. Anderson has not shown reasonable effort to mitigate her damages.

The employer bears the burden of proving that an employee did not mitigate her damages.[90] In order to bear its burden, the employer must show that (1) substantially equivalent positions were available for the charging party to take, and (2) the charging party did not exercise reasonable diligence in seeking positions.[91] Both of these requirements must be satisfied for the employer to prevail.[92] Ms. Anderson admitted that she did not look for other employment while she was drawing unemployment benefits between December, 1993, and April, 1994, and again between January, 1997, and May, 1997, and Schult thus succeeded in establishing that Ms. Anderson was not reasonably diligent in seeking other employment during those time periods. The Company did not, however, provide any evidence whatsoever that substantially equivalent positions were, in fact, available for Ms. Anderson during those time periods. Schult thus failed to introduce evidence satisfying the second prong of its required showing with respect to mitigation. Moreover, Ms. Anderson's decision not to return to R & G Construction in the spring of 1994 does not constitute evidence that she failed to mitigate her damages. Ms. Anderson explained that she did not wish to continue working with R & G because the location of the upcoming construction projects would have required her to relocate her family to South Dakota. Plaintiffs in discrimination cases generally have not been required to relocate in order to be found to have acted reasonably to mitigate their damages.

The record as a whole shows that Ms. Anderson has obtained employment during the time since her termination by Schult that is reasonably comparable to her former employment at Schult, particularly when her education, work history, and status as mother of small children are taken into account. Relevant case law merely requires that a "reasonable, good faith effort" be made to mitigate damages; plaintiffs are not held to the highest standard.[93] In the present case, Ms. Anderson has met this requirement. Her efforts resulted in reasonable success in reducing the wage loss that she suffered as a result of her termination by Schult.

If Ms. Anderson had not been terminated by Schult but instead had remained employed there from July 12, 1993, to the present time, she would have earned approximately $74,360 in wages. This figure is calculated as follows:

| Time Period | Wage Rate | Weekly Rate if 40-Hour Week | Number of Weeks | Total |
|---|---|---|---|---|

| | | | | |
|---|---|---|---|---|
| 7/93-12/93 | $6.50/hr. | $260 | 24 | $ 6,240 |
| 1/94-12/94 | $6.50/hr. | $260 | 52 | 13,520 |
| 1/95 - 6/95 | $6.50/hr. | $260 | 26 | 6,760 |
| 7/95-12/95 | $6.75/hr. | $270 | 26 | 7,020 |
| 1/96 - 6/96 | $6.75/hr. | $270 | 26 | 7,020 |
| 7/96-12/96 | $7.00/hr. | $280 | 26 | 7,280 |
| 1/97 - 6/97 | $7.00/hr. | $280 | 26 | 7,280 |
| 7/97-12/97 | $7.40/hr. | $296 | 26 | 7,696 |
| 1/98 - 9/98 | $7.40/hr. | $296 | 39 | 11,544 |
| | | | | $74,360 |

Ms. Anderson would have received a bonus on top of this amount, which was based upon the dollars produced by the Company per worker hour. The precise amount of the bonus that would have been earned by Ms. Anderson is not clearly reflected in the record.[94] Although the amount of the bonus pay varies, it appears that it generally ranges from $2.00 to $3.50 per hour.[95]

Ms. Anderson has earned the total amount of $61,653 since her termination from Schult on July 12, 1993. This figure was calculated as follows:

| Time Period | Source | Total Income |
|---|---|---|
| 7/93-12/93 | Wages | $ 7,813 |
| | Unemployment Compensation. | 348 |
| 1994 | Wages | 7,819 |
| | Unemployment Compensation | 1,294 |
| 1995 | Wages | 16,344 |
| 1996 | Wages | 14,081 |
| 1997 | Wages | 5,374 |
| 1/98-9/98 | Wages ($5.50/hr., 40 hrs. per week) (39 weeks x $220 per week) | 8,580 |
| | | $61,653 |

Thus, the difference between Ms. Anderson's actual earnings to date and the wages (without bonus) that she would have earned had she remained employed at Schult the entire time is $12,707.

The Judge has determined that compensatory damages in the amount of two times the actual damages, or $25,414, should be awarded in this case, plus prejudgment interest from July 12, 1993. That amount should be adequate to fully and adequately compensate Ms. Anderson for the discriminatory treatment. The doubling of her actual damages is warranted in light of her uncompensated damages such as loss of bonuses and benefits that would have been awarded had she remained employed at Schult, her inability to maintain payments on her home following Schult's termination of her employment, and the unfavorable impact of the need for her to relocate to an area more distant from her children's school, which deprived her children of their ability to participate in after-school activities and deprived the family of the ability to maintain a home in the community they had chosen.

Under Minn. Stat. § 363.071, subd. 2 (1996), victims of discrimination are entitled to recover for mental anguish and suffering. In this case, the Administrative Law Judge is persuaded that Ms. Anderson is entitled to an award of $5,000 for the mental anguish and suffering she endured during and after her employment at Schult Homes, due to her termination on two occasions for a perceived disability. At the time of the first termination on June 15, she became very upset and cried during her discussion with Mr. Parris. She knew that she was going to lose the substantially bigger house in Wabasso close to her children's school into which she had just moved and testified that the termination "was the end of the world basically that day." T. 46. Moreover, the jobs that Ms. Anderson obtained after her termination on July 12 primarily required her to work nights. As a result, she was only able to see her children in the mornings before they left for school. T. 130-31. These circumstances support an award of $5,000 in this case.

Pursuant to Minn. Stat. §§ 363.071, subd. 2, and 549.20 (1996), punitive damages may also be awarded for discriminatory acts when there is clear and convincing evidence that the employer's acts show a deliberate disregard for the rights or safety of others. In this case, the evidence shows that Mssrs. Parris and Weiers deliberately disregarded Ms. Anderson's rights to be free from disability discrimination when they concluded without medical or other evidence that she suffered from crippling arthritis and had to be terminated because the Company did not want to be responsible for crippling Ms. Anderson and "had too many people on workers' compensation and did not need another one." Under the circumstances of this case, imposition of the punitive damages in the amount of $5,000 is warranted. This award takes into consideration the factors set forth in Minn. Stat. § 549.20. The Complainant has established by clear and convincing evidence that Schult showed a deliberate disregard for the rights and safety of Ms. Anderson by the discriminatory manner in which it reacted to her physicians' recommendation for light duty and terminated her employment. The damages awarded reflect the serious nature of the Company's improper conduct. As noted in Finding No. 1 above, the Redwood Falls location of the Company produced approximately $32 million last year and approximately $25 million during 1993, and thus is clearly financially stable.

Based upon the seriousness and extent of the violation, the public harm occasioned by it, the financial resources of the Company, and the fact that the violation was intentional, it is determined that the Company must pay a civil penalty of $10,000 to the State. The amount of the civil penalty reflects the substantial investment of public resources in the investigation, hearing, and determination of this matter and the harm to the public interest associated with such a serious and overt violation of the Minnesota Human Rights Act.

An additional award of litigation and hearing costs and attorney's fees under Minn. Stat. § 363.071, subds. 1(a) and 7 (1996), will be made following the submission of a post-hearing petition by the Complainant for reimbursement of such amounts and submission of the Company's response. The Judge will take such additional argument and/or evidence as is deemed appropriate and shall issue a further Order setting the final amount of these awards.

Finally, the Administrative Law Judge is authorized by Minn. Stat. § 363.071, subd. 2 (1996), to order that a respondent "take such affirmative action as in the judgment of the administrative law judge will effectuate the purposes of this chapter." While the employee handbook expresses the Company's policy to base its actions on "each individual's qualifications and capabilities without regard to race, color, religion, sex, age, disability, or national origin," the Company does not have a specific provision in its employee handbook focusing on the prohibition against disability discrimination and the need for reasonable accommodation unless undue hardship will result, nor does it have specific, understandable written procedures implementing that policy. The Administrative Law Judge has ordered the Company to develop and distribute an appropriate employee handbook provision and written procedures implementing that provision. In addition, the evidence presented at the hearing demonstrated that the Company's supervisors and managers have not received sufficient training regarding the prohibition against disability discrimination and the handling of accommodation requests. Accordingly, the Company has been ordered to provide such training.

B.L.N.

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[1] Department's Initial Memorandum at 16 n. 6.

[2] Minn. Stat. § 363.06, subd. 3 (1996); Minn. R. 5000.0400, subp. 5 (permitting the amendment of charges to "allege additional facts if they relate to or grow out of the facts alleged in the original charge"). It is generally held that amendments to charges relate back to the time that the original charge was filed. *See* 29 C.F.R. § 1601.12(b) (charges filed under Title VII). In addition, the original charge in this case provided adequate notice to the Respondent of the underlying facts; the amended charge simply stated additional legal theories upon which the charging party intended to rely.

[3] 552 N.W.2d 695, 703 (Minn. 1996).

[4] 552 N.W.2d at 702.

[5] *Id*.

[6] 552 N.W.2d at 703.

[7] *Id*.

[8] *Id.*

[9] *Id.* at 702-03.

[10] Respondent's Post-Hearing Brief at 16.

[11] This case thus is distinguishable from *Department of Human Rights v. State of Minnesota by its Board of Trustees of the Minnesota State Colleges and Universities*, OAH Docket No. 12-1700-11200-2 (Order Partially Granting Motion to Dismiss issued April 16, 1998). In that case, Judge Mihalchick, consistent with the present case, denied the respondent's motion to dismiss the Department's claims of discrimination as being per se prejudicial where the probable cause determination was issued 30 months after the charge was filed was denied. However, the respondent's motion to dismiss was granted as to all claims not expressly identified in the charge of discrimination (primarily allegations that the Minneapolis Technical College encouraged and allowed a racially hostile atmosphere to exist at the school) based upon the Judge's determination that the respondent did not receive notice of these additional claims until the complaint was filed 37 months after the charge was filed and was prejudiced by the difficulty it experienced in contacting transient student witnesses. In the present case, there is no allegation of actual prejudice.

[12] Minn. Stat. § 176..031 (1996).

[13] 447 N.W.2d 180, 183-84 (Minn. 1989).

[14] *Id*.

[15] *Id. at 186.*

[16] 498 N.W.2d 759 (Minn. App. 1993).

[17] *Id*. at 762.

[18] *Id.* at 763.

[19] 561 N.W.2d 530 (Minn. App. 1997).

[20] *Id.* at 540.

[21] *Accord Meyer v. Electro Static Finishing, Inc*., unpublished, 1995 WL 366093 (Minn. App. 1995) (Court of Appeals upheld district court's holding that, "[b]ecause Meyer claimed workers' compensation benefits for his back injury and eventually settled his workers' compensation claim, . . . Meyer's disability discrimination claim based on his back injury was precluded by the exclusive remedy provision of the Workers' Compensation Act").

[22] *See*, *e.g*., *Feges v. Perkins Restaurants, Inc*., 483 N.W.2d 701, 710 & n.4 (Minn. 1992); *Sigurdson v. Isanti County*, 386 N.W.2d 715, 719 (Minn. 1986); *Danz v. Jones*, 263 N.W.2d 395, 399 (Minn. 1978).

[23] *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981).

[24] *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978).

[25] *Id*.; *McDonnell Douglas*, 411 U.S. at 803; *Anderson v. Hunter, Keith, Marshall & Co*., 417 N.W.2d 619, 623 (Minn. 1989); *Hubbard v. United Press International, Inc*., 330 N.W.2d 428 (Minn. 1983).

[26] *Sigurdson*, 386 N.W.2d at 720; *Miller v. Centennial State Bank*, 472 N.W.2d 349, 354 (Minn. App. 1991).

[27] *Haglof v. Northwest Rehabilitation, Inc*., 910 F.2d 492, 494 (8th Cir. 1990), *quoting MacDissi v. Valmont Industries, Inc*., 856 F.2d 1054, 1059 (8th Cir. 1988).

[28] *Sigurdson*, 386 N.W.2d at 720; *Fisher Nut Co. v. Lewis ex rel. Garcia*, 320 N.W.2d 731 (Minn. 1982); *Lamb v. Village of Bagley*, 310 N.W.2d 509, 510 (Minn. 1981).

[29] *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506-11 (1993).

[30] Minn. Stat. § 363.03, subd. 1(2) (1996).

[31] Minn. Stat. § 363.01, subd. 13 (1996) (emphasis added).

[32] *Sigurdson v. Carl Bolander & Sons, Inc*., 532 N.W.2d 225, 228 (Minn. 1995) (citation omitted).

[33] 29 U.S.C. § 706(7)(B) and 42 U.S.C. § 12102(2), respectively.

[34] *Sigurdson v. Carl Bolander & Sons, Inc*., 532 N.W.2d 225, 228 & n.3 (Minn. 1995).

[35] *See, e.g., Continental Can Co. v. State*, 297 N.W.2d 241, 246 (Minn. 1980); *Danz v. Jones*, 263 N.W.2d 395, 398-99 (Minn. 1978).

[36] *See State by Cooper v. Hennepin County*, 441 N.W.2d 106, 110 (Minn. 1989); *Fahey v. Avnet, Inc*., 525 N.W.2d 568, 573 (Minn. App. 1994).

[37] *See* Senate Report at 21; House Labor Report at 50; House Judiciary Report at 27.

[38] *Compare* 29 C.F.R. Part 1630 with 29 C.F.R. Part 32.

[39] *Sigurdson v. Carl Bolander & Sons Co.,* 532 N.W.2d 225, 228 (Minn. 1995); *Lindgren v. Harmon Glass Co.,* 489 N.W.2d 804, 808 (Minn. App. 1992); *Rutherford v. County of Kandiyohi,* 449 N.W.2d 457, 461 (Minn. App. 1989).

[40] L. Larson, *Employment Discrimination*, § 8.07 (2d ed. 1998).

[41] *See Hubbard v. United Press International, Inc*., 330 N.W.2d 428, 442 (Minn. 1983).

[42] *Fuqua v. Unisys Corporation,* 716 F. Supp. 1201, 1204 (D. Minn. 1989).

[43] T. 276; Ex. 4, Response to Interrogatories 19 and 20 (attachment R00018-ROOO21).

[44] Minn. Stat. § 363.01, subd. 13 (1) (1996).

[45] Minn. Stat. § 363.01, subd. 13 (3) (1996).

[46] Respondent's Post-Hearing Brief at 6.

[47] *Mastio v. Wausau Service Corp*., 948 F. Supp. 1396, 1415 (E.D. Mo. 1996). *See also School Board of Nassau County v. Arline*, 480 U.S. 273, 283-84 (1987).

[48] 480 U.S. 273, 283 (1987).

[49] *Id.* at 284.

[50] 29 C.F.R. § 1630.2(h).

[51] EEOC Interpretive Guidance, 29 C.F.R. § 1630.2(h) (Appendix) (emphasis added).

[52] 29 C.F.R § 1630.2(I).

[53] 29 C.F.R. § 1630.2(j).

[54] 480 U.S. 273 (1987). See 45 C.F.R. 84.3(j)(2)(ii). Regulations promulgated by the U.S. Department of Labor implementing the Rehabilitation Act define "major life activities" in the same way, with the additional indication that "receiving education or vocational training" is also a "major life activity." 29 C.F.R. § 32.3.

[55] *See, e.g., Sigurdson v. Carl Bolander and Sons Co.,* 532 N.W.2d 225 (Minn. 1995) (the Court found that the plaintiff's ability to work had "not been greatly impeded by his diabetes since he has been able to obtain and retain employment for most of his adult years"; because his diabetes "has not materially limited his ability to obtain and retain employment, . . . his failure to obtain one job does not render him disabled"); *State by Cooper v. Hennepin County*, 441 N.W.2d 106 (Minn. 1989) (plaintiff did not meet the "substantially limited" standard then set forth in the MHRA because he had only been rejected for one specific job and was qualified to obtain many other jobs in the law enforcement field; the County did not regard plaintiff as having an impairment due to his myopia); *Fahey v. Avnet, Inc*., 525 N.W.2d 568 (Minn. App. 1994) (a former employee who suffered from a condition limiting her typing ability did not suffer from an impairment that materially limited a major life activity so as to render her disabled within the meaning of the MHRA since she was able to perform a variety of tasks other than typing; failure to qualify for a single job did not constitute being limited in a major life activity).

[56] T. 268.

[57] T. 71.

[58] T. 71.

[59] T. 72.

[60] T. 264.

[61] Minn. Stat. § 363.01, subd. 35(1) (1996).

[62] Schult's Post-Hearing Brief at 12.

[63] Schult's Post-Hearing Brief at 12.

[64] *State by Khalifa v. Hennepin County*, 420 N.W.2d 634, 640 (Minn. App. 1988), *citing Legrand v. Trustee of University of Arkansas*, 821 F.2d 478, 481 (8th Cir. 1987).

[65] *State by Khalifa v. Hennepin County*, 420 N.W.2d at 640.

[66] Minn. Stat. § 363.01, subd. 35 (1996).

[67] Ms. Anderson testified that she first worked in the Hardware Department on approximately June 22 and returned some half days on or after approximately June 29, 1993. She worked at Schult on June 30 and July 1-2, was off work for the Fourth of July holiday weekend on July 3-5, went home early on July 6,

was ill on July 7-9, and was terminated on July 12. Even based on information provided by the Company, Ms. Anderson did not begin working in the Hardware Department until July 28. Ex. 3, att. 8 at 5.

[68] *Compare Katz v. City Metal Co*., 87 F.3d 26 (1st Cir. 1996) with *Deane v. Pocono Medical Center*, 7 AD Cases (BNA) 198 (3d Cir. 1997), *rev'd on other grounds following rehearing en banc*, 1998 U.S. App. LEXIS 7622 (3d Cir. 1998).

[69] Ex. 6F at 16.

[70] EEOC Interpretive Guidance, 29 C.F.R. §1630.9 (Appendix); *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1135 (7th Cir. 1996) (parties should participate in good faith in the interactive process and make reasonable efforts to help the other party determine what specific accommodations are necessary; "[a] party that fails to communicate, by way of initiation or response, may . . . be acting in bad faith).

[71] Ex. 3, att. 8 at 5 (emphasis added).

[72] T. 293, 346.

[73] Schult also asserts that Ms. Anderson was not qualified for the position she held because of her inability to handle the job and her attendance record. It is proper to reserve consideration of job-performance-related issues to the later stages of the McDonnell-Douglas analysis. *See, e.g., Bienkowski v. American Airlines*, 851 F.2d 1503, 1506 (5th Cir. 1988); *Rutherford v. County of Kandiyohi,* 449 NW.2d 457, 462 (Minn. App. 1989).

[74] As noted in the Findings of Fact, Ms. Anderson was evaluated at regular intervals commencing on May 17, 1993, up to her thirty-day review on June 14, 1993. In all of these reviews, Ms. Anderson was ranked as performing her work at an average or higher than average level. See Ex. 3 (response to Request No. 31 and att. 7).

[75] Despite Schult's arguments to the contrary, the Judge does not find that the fact that Ms. Anderson failed to produce the tape recording she made of the July 12 meeting undermines her credibility. Ms. Anderson adequately explained that she has made a diligent search for the tape recording and simply has been unable to find it, perhaps due to the frequency with which she has moved since 1993.

[76] T. 336, 332.

[77] T. 331.

[78] Ex. 8D.

[79] Ex. 3, att. 8 at 5, 6.

[80] *Id*.; Ex. 8F.

[81] *Lindgren v. Harmon Glass Co.,* 489 N.W.2d 804, 808-09 (Minn. App. 1992). *Accord Miller v. Centennial State Bank,* 472 N.W.2d 349, 353-54 (Minn. App. 1991) (performance problems linked to an employee's sleep apnea were a legitimate reason for the employee's discharge).

[82] *Hendry v. GTE North, Inc*., 896 F. Supp. 816 (N.D. Ind. 1995).

[83] There is no suggestion that Ms. Anderson was in any way to blame for this injury.

[84] T. 267, 334.

[85] This testimony also stretches credulity, given that the Company had sent Ms. Anderson to Dr. Angstman for the express purpose of having him examine her for her "medical condition of arthritis." Ex.

3, att. 3 (permission slip signed by Ms. Anderson); see also Ex. 3, att. 1 (Schult paying doctor's bill for "employment check on arthritis").

[86] *Cook v. Rhode Island Department of Mental Health, Retardation, and Hospitals*, 10 F.3d 17, 27 (1st Cir. 1993) (Court noted that "one of appellant's justifications for rejecting plaintiff—its concern over high absenteeism and increased workers' compensation costs—is itself a prohibited basis for denying employment").

[87] *Anderson v. Hunter, Keith, Marshall & Co*., 417 N.W.2d 619, 624 (Minn. 1988).

[88] *Anderson v. Hunter, Keith, Marshall & Co*., 417 N.W.2d 619, 626 (Minn. 1988); *Brotherhood of Railway and Steamship Clerks v. Balfour*, 303 Minn. 178, 229 N.W.2d 3, 13 (1975).

[89] *Anderson*, 417 N.W.2d at 626, *quoting Ford Motor Co. v. EEOC*, 258 U.S. 219, 231 (1982).

[90] *Sias v. City Demonstration Agency*, 588 F.2d 692 (9th Cir. 1978); *Sprogis v. United Airlines*, 517 F.2d 387 (7th Cir. 1975); *accord Henry v. Metropolitan Waste Control Commission*, 401 N.W.2d 401, 406 (Minn. App. 1987) (discharge of veteran); *Spurck v. Civil Service Board*, 42 N.W.2d 720, 727 (Minn. 1950) (discharge of public employee).

[91] *Wooldridge v. Marlene Industries*, 49 Fair Empl. Prac. Cas. (BNA) 1455 (6th Cir. 1989).

[92] *Odima v. Westin Tucson Hotel*, 53 F.3d 1484, 1487 (9th Cir. 1995) (to carry its burden that the plaintiff failed to reasonably mitigate her damages, the defendant must show "that, based on undisputed facts in the record, during the time in question there were substantial equivalent jobs available, which [the plaintiff] could have obtained, and that [the plaintiff] failed to use reasonable diligence in seeking one") (emphasis in original); *EEEOC v. Gurnee Inn Corp*., 914 F.2d 815 (7th Cir. 1990) (summary judgment denied to employer where the employer alleged that the claimants had failed to seek other employment but had not established that there was a reasonable chance the claimants could have found comparable employment; in order for the employer to bear its burden, it must demonstrate *both* that the claimants were "not reasonably diligent in seeking other employment, and that with the exercise of reasonable diligence there was a reasonable chance that [the claimants] might have found comparable employment").

[93] *Eichenwald v Krigels, Inc*., 908 F. Supp. 1531, 1567 (D. Kan. 1995).

[94] T. 299-300.

[95] T. 273-74.